

REPORTS
OF
CASES

ADJUDGED IN THE

Court of King's Bench:

FROM

HILARY TERM, the 14th of GEORGE III. 1774,

TO

TRINITY TERM, the 18th of GEORGE III. 1778.

Both Inclusive.

By HENRY COWPER, Esq.

BARRISTER AT LAW, OF THE MIDDLE TEMPLE.

SECOND EDITION;

IN TWO VOLUMES

VOL. I.

LONDON:

PRINTED BY A. STRAHAN,
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY,
FOR E. AND R. BROOKE AND J. RIDER, BELL-YARD, TEMPLE-BAR.

1800.

REPORTS

CLASSES

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PREFACE

TO

THE FIRST EDITION.

TO begin, where so many examples teach us rather to end; to submit the early labours of youth to a tribunal, from which some of the highest judicial characters have withheld the fruits of their experience, certainly appears to border upon imprudence, not to say, upon arrogance.

Sensible of the truth of this observation, it is with the utmost diffidence that I presume to lay the following Work before the profession: conscious that it can deserve little praise, and *barely* indulging a hope, that the anxiety I have felt in compiling it, may not be justified by an unfavourable reception, both by the bench and bar. If I have ever flattered myself with more than this, it has been from the encouragement of those who first emboldened me to attempt so arduous an undertaking, and whose countenance has since induced me to persevere.

Before I proceed to state the plan I have pursued, it is but gratitude to the memory of the late Sir *James Burrow*, as well as a gratification to my own feelings, to acknowledge how much I am indebted to him for the perusal of his papers, which, without any previous acquaintance, he offered, in the most obliging manner, to my use.

It is next to impossible, where there is a diversity of opinions, to fix upon any plan that will be entirely free from objection: And there is, perhaps, no subject about which the profession differ more, than the proper method

of reporting. It is almost of necessity therefore, that every one who engages in this species of publication, is left to his own choice. My great object has been, not to swell the work by unnecessary length of pleading, or by a detail of the arguments delivered by counsel on each side: But to state the former as concisely, and to give the scope of the latter (one or two instances excepted), in as comprehensive a manner, as the nature and importance of the subject would admit. Every omission, therefore, must be laid to my charge alone; whilst, on the other hand, it would be more than presumption in me to suppose that any arrangement I have made of the subject matter, can do justice to the ingenuity and ability of those who furnished it.

With respect to the judgment of the Court, I have endeavoured to be as faithful, accurate, and full, as the assistance of short hand, and the most earnest attention, could enable me to be. I would by no means, however, be understood to profess, that I have given more than the substance of what fell from the bench. If I have in any degree succeeded in doing that, so as not to incur their censure, I shall be more than recompensed for the toil and anxiety necessarily attendant on such an undertaking.

In a compilation of this sort, in which a variety of legal topics have been nicely discriminated, and copiously discussed, it is impossible but that some mistakes must occur to attentive and judicious observation: Yet, I trust such errors will be found to be trivial, or, at least will appear so to the candour and liberality of the profession, if the work should be thought to deserve a general character of authenticity.

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ERRATA,

- Page* 312, line 27. *after do leave out no*
 354. — 17. *for shews read shew*
 371. — 20. *for ab libitum read ad libitum*
 384. — 36. *for statutes read statute*
 433. — 6. *for plaintiff read plaintiffs*
 436. — 11. *for objection read object*
 443. — 3 *from bottom, for have read has*
 459. — 23. *after in insert a*
 478. — 7. *for may read might*
 508. — 33. *for the read they*
 550. — 25. *marg. for where read were*
 562. — 2. *for o her read other*
 805. — 10. *for plaintiff read defendant*
 826. — 3 *from bottom, after engine insert a comma*

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HILARY TERM

14 GEORGE III. B. R. 1774.

LEE *versus* GANSEL.

Tuesday,
25th Jan.

THIS came before the court upon a rule to shew cause why the defendant should not be discharged out of the custody of the Warden of the *Fleet*; upon the ground of his having been illegally arrested; that is, "that the Officer broke " into the apartment of the house where he *lodged*," and which he had rented by the year, for the space of eight and twenty years before. The breaking open the door was positively sworn to on the part of the defendant, and as positively denied by the officer; who swore, that the door was open, and that having got his thigh in, a struggle ensued, in which, after a time, he prevailed, and then arrested the defendant. The entrance of the officer into the house was at the *outer* door, and was admitted on all hands to have been peaceable and legal.

A bailiff, in execution of *mesne* process, may break open the door of a *lodger's* apartment, having first gained peaceable entrance at the outer door of the house.

Mr. *Wallace*, Mr. *Bearcroft*, Mr. *T. Cowper*, and Mr. *Buller* shewed cause,

First, It is necessary upon an application of this kind, for the defendant to make out a clear case, and to entitle himself to the discharge he claims beyond all controversy or doubt. But here, the evidence is so contradictory as to leave him no case in point of fact; and if it did, the law is against him; which introduces the *second* and the principal question in the cause, "Whether " this lodging was the *dwelling-house* of the defendant, or " not?"

The cases upon burglary are material to the discussion of this question.

VOL. I.

B

In

1774.

LEE
versus
GANSEL.

In Lord *Hale, Hist. Plac. Cor.* 556. it is said, that, "if *A.* hires a chamber in the house of *B.* for a certain time, wherein he lodgeth, and during the time contracted for it is broke open, this is burglary; and the indictment shall suppose it to be *domum mansionalem* of *A.*" But this is contradicted in many cases; particularly in *Kelynge* 83. where it is expressly laid down, that, "As to an inmate who goeth in at the same door as the owner of the house, he is in the nature of a *lodger*, and if his chamber be broken open, it is burglary; but the indictment must be laid for breaking the dwelling-house of *him* that let it, and not of the inmate."

In the present case Mr. *Gansel* is only an inmate, and therefore according to the above authority it cannot be said to be his dwelling-house.

Again, at the *Old Bailey* sessions after *Michaelmas* term 1701, it was held, per *Holt* Chief Justice, "That where inmates have separate rooms in a house, if they enter at the same outer door as the owner, the rooms are not the dwelling-house of the inmates, but of the owner."

Consistent with the opinions of these two great men, is a decision as late as *Mich. 13 Geo. 3.* "One *Rogers* was indicted for a burglary in the dwelling-house of *Chandler*, who rented only a shop and parlour in it of the owner: The rest of the house was occupied by different inmates; the owner himself inhabiting no part of it. It was objected, that the burglary ought to have been laid in the mansion-house of the owner; each apartment in it being occupied by inmates. But all the Judges agreed that it was properly laid; else there would be no security from burglary in such a case: But they likewise held, that, if the owner had inhabited any part, it would have been clearly otherwise."

These cases by analogy shew, that the apartment in question cannot be said to be the dwelling-house of Mr. *Gansel*.

But, *thirdly*; supposing it were his dwelling-house, though in such case the bailiff ought not to break open the door, yet if he does, it will not invalidate the arrest; for there are many cases in which an arrest may be good, though the conduct of the officer is not strictly right in point of law. In support of this was cited *Bro. Abr. tit. Execution pl. 100. tit. Trespass. pl. 390.*—18 *E. 4. 4.* where the sheriff, upon a *feri facias* awarded, broke open the house to take the goods. By

Littleton

Littleton and the court; trespass will lie for breaking the house, but the taking the goods was lawful. *S. C. Dalton's Sheriff*, pag. 350. This is an authority in point; and clearly proves that if it were the dwelling house of the defendant, it does not follow that the arrest is illegal. Upon the whole therefore the defendant ought not to be discharged out of custody.

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An affidavit of *Lee* was offered to be read. Objected; that he stood convicted of perjury, and the conviction was produced.— But, *per Lord Mansfield*, a conviction upon a charge of perjury is not sufficient, unless followed by a judgment; I know of no case, where a conviction alone has been an objection: Because, upon a motion in arrest of judgment, it may be quashed.

One convicted of perjury, is a competent witness, before judgment.

Mr. Dunning, *Mr. Mansfield*, *Mr. Cox*, and *Mr. Murphy* in support of the rule.

The defendant was the *sole* proprietor of this apartment; as such, it was equally his *Castle*, in the legal sense of that word, as if he had occupied the *whole* house; and he is equally intitled to protection in it. For the privilege which the law annexes to every man's house is the privilege of protection, and with that view, and in that sense only, is a man's house said "to be his castle." The defendant in this case had no right to shut the *house* door; but he had a right to shut his *own* door; and if it might be broken open, what protection or what safety is there under such circumstances? It is therefore within the reason of the privilege, though there may be no direct case in point.

As to the cases of burglary, it is clear that burglary may be committed in such an apartment: The only doubt is, whose dwelling-house it should be called? But upon civil process neither a house nor lodging can be broken open.

The term *inmate*, cannot be applied to *General Gansel*. In common acceptation it means *rogue*, *vagabond*, &c. it is not applicable to a person who hires a *distinct* apartment, unconnected with the *owner* of the house. This is as much a distinct property as the *chambers* of a college or of an inn of court, which have all one *common* entrance or fore-door: yet they are the *dwelling-houses* of the different persons who inhabit them. By parity of reason, a *lodging* is the *mansion* of the person who hires it: and so it is expressly laid down by *Lord Coke*, 3 *Inst.* fol. 65. "A chamber or room, be it upper or lower, wherein any person doth inhabit or dwell, is *Domus mansionalis* in

1774. "Law." If so, the officer had no right to break open this apartment in execution of mesne process.

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As to the *abuse* of the process being no ground for discharging the Defendant, it was answered, that in all cases of privilege, the party arrested is not left to seek his remedy by *action*; but the court does that which is the substantial Justice of the case, and places the Party in the same situation as if there had been no abuse, or irregularity in the process; and *ex parte Wilson*, 1 *Atkyns* 152. was cited: *Wilson* becoming bankrupt, a commission issued; after which he was arrested at the suit of the petitioning creditor; and being in custody, was charged with another action at the suit of one *Wass*. Upon petition to the Chancellor to be discharged out of custody upon both actions, Lord *Hardwicke* said, "Even at law where there is an irregular arrest, and an advantage is taken of the irregularity to charge the party in custody at the suit of another person, the court of law will discharge him from both: and ordered the bankrupt to be discharged accordingly."

Lord MANSFIELD said, he had not much doubt at present, but it might be proper to look into the cases, and also into some that had not been cited. *Curia advisare vult*.

Afterwards, on *Thursday* 27th *January* 1774, Lord Mansfield delivered the opinion of the court as follows:

This is an application on the part of General *Gansel* to be discharged out of custody on the following ground. That the process issued against him by this court has been abused, and his person illegally arrested; for that the officer *broke open* the door of his apartment which by law he could not do: therefore the court ought to discharge him, and put him in the same condition as before the arrest.

To this charge *three* defences are set up on the part of the plaintiff in the action and of the officer complained against. The *first* is, that in fact the door was *not* broken open; but was previously *open*: and the officer having got part of his body, that is to say, his thigh in, after a struggle to get in the rest, in which he prevailed, arrested the defendant. The *second*, which goes to a denial of the whole ground of the application, is this; "That the door which was broken open, the officer had a right to break open, due notice having been announced, and a refusal given." The *third* is, that supposing Mr. *Gansel* founded in his application, as to the mode of the arrest being illegal; yet
his

his remedy is by action of *trespass* for breaking open the door, or by the more summary mode of *attachment* against the officer; nevertheless, that the supposed trespass upon his person is legal, for that the officer had a right to arrest him.

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These are the three defences; and as to the *first*, there is so great a contrariety of evidence, that there must be false swearing. I doubt therefore where the truth lies: and supposing the fact contended for on the part of the plaintiff in the action to be true, I doubt as to the consequence: that is, if an actual breaking open of the door were illegal, I doubt as to the law, where a door being *partly* open is *shut* by the person who is within, against the officer who is struggling to get entrance. I doubt both as to the fact and the consequence; and therefore lay that entirely out of the case.

The *second* ground of defence and which makes the next question in this case is, Whether *this* door might be *lawfully broken* open in execution of mesne process? And as to that, the case is this. Mr. Mayo was owner of this house, in which General Gansel had at the time in question, and for a long time before, taken the first floor which consisted of two rooms, each of which had a door that opened upon the staircase; he had likewise up two pair of stairs, two rooms, each of which had a door that opened in the same manner: he had the use of the kitchen besides, and he rented these several apartments as a *lodger* from year to year, though that circumstance makes no difference. Mr. Mayo lived in the house; and, which is the *material* part of the case, there is but *one outer door* to the house; at which Mr. Mayo enters to go to his apartment, and Mr. Gansel to go to his. This is a fact concerning which there is no controversy. Mr. Gansel was up two pair of stairs in his bed-chamber, and as he says, the door was locked; and that after notice the officers broke it open; though nothing turns upon the notice or mode of breaking. The question is, "Whether by law this door could " be broken open.

I should first state however, that the *outer door* of the house was *open*, and that the officers entered there legally. The question therefore turns upon the subsequent breaking open of the bed-chamber door.

The books talk of the *privilege* of a *mansion-house* and of the privilege of the *door* of it, which cannot be broken open. The whole question will therefore turn upon the *extent* of that

1774. which is called *privilege*. Now this rule of privilege, arising from a sound maxim of *policy*, is no privilege of a *debtor* properly speaking who absconds from justice in avoidance of legal process; but is annexed to the *house* and *door* (to which door I forbear at present to give any particular epithet) for the *protection* of a man and his family. It is therefore by consequence only, that the privilege is a protection to such a person, and not for his own sake. The sound maxim of *policy* is this, “*that a greater evil should be avoided for a less, and that a less good should give way to a greater.*” The *outer* door therefore or window of a man’s house, says the law, shall *not* be *broken* open by process. This has been long and well understood. The ground of it is this; that otherwise the consequences would be fatal: for it would leave the family within, naked and exposed to thieves and robbers. It is much better therefore, says the law, that you should wait for another opportunity, than do an act of violence, which may probably be attended with such dangerous consequences. But as this is a maxim of law in respect of political justice, and makes no part of the privilege of a debtor himself, it is to be taken *strictly*, and not to be extended by any equitable analogous interpretation.

The oldest case to be found in the books that takes notice of this privilege and warrants it, and upon which authority it was allowed at all, is a case in the year-book 18 *Ed. 4. page 4. pl. 19.* “There, an action of trespass was brought for *breaking* “the *outer* door in execution of a *fiery facias*. The court held, “that trespass would lie, for the officer shall *not break* open an “*outer* door to execute his process: but when the officer had “so got in, he *broke* open a *trunk*, and took out the goods that “were in it; in respect of which they held, that trespass would “not lie; for he had a right to break the trunk, and take the “goods.” I quote this case not to imply that I should perhaps have been of the same opinion myself in a case of the first impression; but to shew, that the rule of privilege is taken most *rigidly*. Afterwards, in *Semaine’s* case, 5 *Co. Mich. 2 Jac. page 93.* the same strict doctrine was held, namely, “that “breaking open the *outer* door was a trespass, but that taking “away the goods was lawful.” In *Yelverton*, *Mich. 44. El. 29.* which was the same case, *Popham* doubted whether *even* the *outer* door was privileged, because it would be a hindrance to justice: but afterwards, in *Mich. 2 Jac. 5 Co. 92. b. 93. a.*

the whole court held, "that the *outer* door ought not to be "broken open"; and grounded their opinion upon the single authority of 18 *Ed. 4. p. 4. pl. 19.* before quoted. You see from hence with what *rigour* the privilege has been construed in the oldest cases.

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But no case or dictum has been cited at the bar, nor indeed did there ever exist a case, which intimated a doubt whether an *inner* door might *not* be broken open. In *Hob. 62. and 263.* among other outrageous things the bailiff broke open a chamber door, having entered legally at the outer door; but such breaking was held lawful, the first entrance at the outer door which was open, having been legal: and yet the latter was a very harsh case, for they broke in when the man and his wife were in bed, and behaved with great violence and outrage. But I lay stress on this to shew how *strictly* the privilege has been understood, when the *outer* door or *window* is secure, and when the entrance has not been forcible through either of them, so as to lay open the house and its inhabitants to insult and violence from without; but on the contrary has been quiet and peaceable. In addition to these authorities, I recollect a note of a case lately determined, which says, "an *inner* door has *no* protection at all." It was the case of *Afley and Pindar*, and was heard in the year 1760, *Mich. 1 Geo. 3.* There, all the other charges against the bailiffs were answered, except breaking the *inner* door, which was accompanied with such violence, that the door fell, and the officer with it into the room: but all the court were of opinion, that the officers having lawfully entered at the *outer* door, might break open the *inner* to execute the duty of their office. Besides these cases, and in conformity to the principles upon which they have gone, I shall cite a very sensible and material distinction from a book in my hands, which is *Foster C. L. title Homicide, c. 8. sect. 20.* which is this. "The rule that every man's house "is his castle, when applied to arrests on legal process, has been "carried as far as political justice will warrant, and perhaps "further than in the scale of reason and sound policy they will "warrant. But in cases of life we must adhere to rules well "known and established. But this rule is not one of those "that will admit of any *extension*. It must, therefore, as I have "before hinted, be confined to the breach of windows and of "outer doors intended for the security of the house against "persons from without, endeavouring to break in."

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This brings the question to this point, "Whether this was
" the *outer door* to the *house* of the defendant? for the law, we
" have seen, does not privilege an *inner door*."

It has been said, that this lodging is an house, and has an
outer door; and it has been likened to the case of chambers in the
inns of court and in colleges, which have each an outer door that
opens, like the door in question, upon the common staircase, and
which, in cases of burglary, have been held to be the houses of
the respective occupiers. The fact is, that from the nature of
those buildings, they are *all* as *several* houses, and have *separate*
outer doors which are the extremity of obstruction; because the
staircase is no outer door. Again, they are enjoyed as separate pro-
perty: In *Lincoln's-Inn*, they have separate estates of inherit-
ance; in the others, they have estates for life, and in colleges as
long as they reside. So, if that which was one house originally
comes to be divided into separate tenements, and there is a dis-
tinct outer door to each, they will be separate houses, as
Newcastle-house.

The distinction therefore can only be between several outer
doors, and one outer door.

How far Lord *Hale* meant to carry his opinion in the passage
that has been cited, it is difficult to say. Where a burglary is
committed in the apartments of one who lodges in a house, the
circumstance of the *owner's living* in it, or his occupying only
a shop or cellar in which he does *not sleep*, makes a very material
difference as to the form of the indictment; for in the latter case
the *lodger* has the *outer door* entirely to himself; and the burglary
in such case, must be laid to be in the house of the lodger; but
it is otherwise in the former case, for there it must be laid to be in
the house of the owner. And notwithstanding the greatness of
Lord *Hale's* authority, it appears not clearly expressed, or perhaps
not fully considered; at all events, we must not determine upon
a single and uncertain *dictum*, against the many late and positive
cases, grounded on the oldest decisions and most established
principles.

But, if there were nothing more to confute the doctrine which
has exhausted so much learning and ingenuity in support of it,
the absurdity of the proposition would of itself be sufficient.
And it is this, that whereas the *greatest house* in *London* has
but *one* outer door; this gentleman having *four rooms* in one
house, shall have *four distinct outer doors*. If any of them could
be

be said to be an outer door, it must be the door of the lower rooms; but the truth is, they are *all* inner doors.

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Therefore we are all most clearly of opinion, that by law, *this* door was *legally* broken open.

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With regard to the point of relief, in case the arrest had been illegal, I give no opinion; though I think it would depend upon the behaviour of the party applying. It is possible a person might come to ask that relief, under circumstances of such gross misbehaviour as might induce the court to refuse it. Though the court, where a person is arrested who has been attending its process, will interpose, not only by punishing the officer, but by discharging the prisoner out of custody; yet cases of this sort are always matters of discretion with the court under their particular circumstances.—But it is not necessary here to enter into that point; as we are all clearly of opinion that General *Ganzel* was legally arrested; and, therefore, ought not to be discharged.

Per cur. Rule discharged.

MOORE *versus* MAGRATH.

Tuesday,
Feb. 11.

ERROR upon a judgment of B. R. in *Ireland* in an ejectment brought for certain lands in the county of *Roscommon*: Plea, not guilty. Upon the trial the jury found a special verdict in substance as follows:

One by deed in consideration of love and affection to his name, blood, &c. and for settling the one undivided moiety of his manors, lands, &c. thereafter mentioned grants the said undivided moieties, particularly describing them, together with all other his lands, tenements, and hereditaments in the kingdom of Ireland: Habendum the said undivided moieties before granted, together with all other his estate in the kingdom of Ireland, to A. to the several uses thereafter declared, and for no other use whatsoever; and then declares the uses of the undivided moieties only. *Per Cur.* held that the grantor did not intend to pass any lands but the undivided moieties. *adly*, Supposing the sweeping clause did extend to any other lands, yet no use being declared of them, they descend to the heir at law,

“ That *Michael Moore* being seised in fee of an undivided moiety of certain lands in the county of *Mayo*, and also of an undivided moiety of certain other lands in *King's County*, both in right of his wife; and being likewise seised of certain lands, &c. in the county of *Roscommon*, for which the ejectment was brought, and of other lands in the counties of *Clare* and *Galway*; all which latter were his paternal estate, executed a deed, bearing date the 2d of *October* 1742, as follows:

“ This indenture tripartite, &c. between *Michael Moore* of *Cloncoran* in the county of *Roscommon* Esq; of the one part, and *Robert Dillon* of, &c. of the 2d part, and *Ross Mahon*, of, &c. of the 3d part. Witnesseth, that the said *Michael Moore*,

ments in the kingdom of Ireland: Habendum the said undivided moieties before granted, together with all other his estate in the kingdom of Ireland, to A. to the several uses thereafter declared, and for no other use whatsoever; and then declares the uses of the undivided moieties only. *Per Cur.* held that the grantor did not intend to pass any lands but the undivided moieties. *adly*, Supposing the sweeping clause did extend to any other lands, yet no use being declared of them, they descend to the heir at law,

“ for

1774. " for and in *consideration* of the natural *love* and *affection* which
 " he hath to his *name*, *blood*, and *family* and for settling and se-
 MOORE " curing the *one undivided moieties* of the manors, castles, towns,
 versus " lands, tenements, and hereditaments hereinafter mentioned,
 MAGRATH, " in his name, blood, and family, subject to the payment of his
 " debts, &c. and in consideration of five shillings to him by the
 " said *Robert Dillon* in hand paid, &c. he the said *Michael*
 " *Moore* HATH granted, &c. and by these presents BOTH
 " grant, &c. the *one undivided moieties* of all that and those
 " the manors, castles, towns, lands, tenements, and heredita-
 " ments following, that is to say, — Here the deed describes
 every part and parcel of the undivided moiety in the county of
Mayo. — " As also all that," — Here the deed as minutely
 describes the undivided moiety in *King's County*: and proceeds
 as follows. " Together with *all other* the said *Michael Moore's*
 " *lands*, tenements and hereditaments *in the kingdom of Ireland*.
 " TO HAVE and to HOLD the said undivided moieties of the said
 " manors, castles, towns, lands, tenements and premises, herein
 " before granted, or intended to be granted, with their and every
 " of their rights, members and appurtenances, together with *all*
 " *other* the said *Michael Moore's estate* in the kingdom of *Ireland*,
 " unto the said *Robert Dillon* and his heirs, to the several *uses*,
 " intents and purposes *herein after declared*, limited, and appoint-
 " ed, and to and for *no other use*, intent or purpose whatsoever;
 " that is to say, as for and concerning the one undivided moiety
 " of the said lands and premises lying and being in the county of
 " *Mayo*, to the use and behoof of the said *Michael Moore* and
 " his heirs for the payment of debts, remainder to himself in
 " tail, remainder to *Garret Moore* for life, remainder to the
 " first and other sons of *Garret Moore* in strict settlement, re-
 " mainder to fourteen persons of the name of *Moore*, his brothers
 " and cousins successively in tail-male remainder to his own
 " right heirs." The like uses are repeated and declared respecting
 the undivided moiety in *King's County*, except that a term of
 500 years is given to *Ross Mabon* for the purpose of securing a
 jointure of 200*l.* a year, to *Francis Moore* his wife; and to
 raise the sum of 1500*l.* for his daughters portions.

" That on the 25th of *March* 1743, *Michael Moore* died leaving
 " *Mary Moore*, now *Mary Concannon*, one of the lessors of the
 " plaintiff in ejectment, and *Francis Moore*, his co-heirs at law.

" That in *Trinity* term 1755, *Garrett* levied a fine and suffered
 " a recovery of the *Roscommon* estate to himself in fee: and died

" on

" on the 4th of *February* 1767, without issue: Upon his death, *Edmond Moore* entered; and by lease and release, 28th and 29th of *June* 1768, conveyed the premises to *Luke Dillon*, to the use of himself in tail-male; remainder to *John Moore* for life, remainder to his first and other sons in strict settlement. That *John* being in the *French* service, was by decree in the *Exchequer*, held to be disabled under statute 19 *Geo.* 2. to hold the said estate, and his interest was decreed to *William Biggen* as the first informer, who assigned the same to *Garret* the defendant in ejectment, who entered on the 12th of *April* 1771."

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Upon this special verdict, the court of *King's Bench* in *Ireland* gave judgment for the plaintiff; which was entered upon the record as follows: "Therefore, it is considered that the said *John Magrath* do recover against the said *Garret Moore* his said several terms yet, &c. in the said demised premises," &c.

For the plaintiff in error, *Obj.* 1st. It is not stated upon the record that the defendant is *guilty*: therefore there is no verdict, and consequently there can be no judgment.—*Resp.* In substance, the defendant is found guilty: for it is implied, in saying, "that the plaintiff shall recover the premises:" the judgment therefore is merely informal, and may be amended.

Obj. 2dly. The plaintiff has no right to recover; for it was clearly the intention of the donor to include, under the general sweeping clause in the deed, the whole of his estates in *Ireland* not before disposed of, and to settle them to the same uses as he had declared respecting the two undivided moieties.—*Resp.* His intention was only to settle the undivided moieties, and the preamble takes notice of nothing else; therefore, if the intention is to govern, the lands in question did not pass by the sweeping clause. But supposing they did, no use is declared of them: Therefore they result to the donor; and consequently the lessors of the plaintiff are well entitled. *Strong* versus *Teat*, 2 *Bur.* 912.

Lord Mansfield. I am very clear. It might be plainer with the deed: but, without seeing the deed, it is plain enough.

This gentleman was seised of an estate in right of his wife, which consisted of an undivided moiety of lands in the county of *Mayo*, and of another undivided moiety of lands in *King's County*: He was likewise seised of a paternal estate in three other counties; and

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and his seat and residence, at the time of making the deed in question, was upon his paternal estate, the lands in dispute.

Two questions arise; and the determination of either is sufficient.

1st, Whether upon the true construction of this deed the donor has settled his paternal estate? If he has, that has conveyed it to Mr. *Dillon*.

2dly, Whether he has declared any use of it? If he has not, it must result to himself: for the declaration being that the estate should be to such uses as were *declared*, and *no other*, unless he has declared some use, there is no disposal of it: and in order to disinherit an heir at law, a man must give his estate to somebody else.

With respect to the first point, it strikes me very strongly, that being seized of a paternal estate, and an estate in right of his wife, it was reasonable he should not settle both; and I believe there was some private motive for his settling the one in preference to the other; but not seeing the deed we are at a loss.

I am of opinion that he never had an idea of conveying any part of these lands by the deed of 1742, though, by the blunder of the drawer, he may have used words that might extend to them.

The deed begins with the preamble usual in all settlements; that is, by reciting what it is that the grantor intends to do; and that, like the preamble to an act of parliament, is the *key* to what comes afterwards. Now the preamble does not mention a word of his paternal estate: whereas, if it had been his intention to settle that, would he not have added after the word "*moieties*" words to the effect following, and also *all* other his lands, &c. in the kingdom of *Ireland*? It is scarcely possible, if he had an idea of including his paternal estate in the settlement, that he should recite his intention of settling the one, and be totally silent as to the other. Again the deed goes on, with much tautology, to describe every part of each of the undivided moieties, most minutely and particularly: Would he do that, with an intention of passing his *paternal* estate by the same deed, and make no description of it at all? It is very common to put in a sweeping clause; and the use and object of it in general is, to guard against any accidental omission: but in such cases, it is meant to refer to estates or things of the same nature and description with those that have been already mentioned. I am therefore of

opinion from the words of the preamble, that the donor did not intend to include his paternal estate: and it is more than probable that the drawer by mistake omitted inserting the two counties before the words "in the kingdom of Ireland."

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The second question is, "Whether any use is declared of the "sweeping clause?"

Now though he has minutely described the uses of the undivided moieties, he certainly has not declared any one use or limitation of the sweeping clause. This circumstance alone is a strong argument in favour of the construction which the court inclines to upon the first point. But nothing can be so clear, as that this estate must result to the heir, since no use is declared of it.

Mr. Justice *Aston*, M. Justice *Willes*, and Mr. Justice *Asb-hurst* concurred.

Per Cur. judgment affirmed.

REX versus GENGÉ.

Saturday,
Feb. 5th.

THE defendant was indicted, for that he at a court leet, holden in and for the hundred of *Whitchurch* in the county of *Dorset*, was, by the jury of the court, elected constable of the hundred; that he was a resiant and liable to serve the office, and had notice of his election; that the steward certified in writing to all justices, &c. that the defendant was elected constable; but was not present nor was sworn; and that the defendant afterwards was summoned to appear before a justice of peace to take the oath of office, but he had refused to be sworn into, or to execute the office. The defendant pleaded the general issue; and the indictment was tried at the last assizes at *Dorchester*, when the jury found a special verdict, stating in substance as follows:

One who is a resiant within a private leet, within the hundred, is not therefore exempt from serving the office of constable of the hundred: And a custom to elect such a one constable is good.

'That from time whereof the memory of man was not to the contrary, there had been and was a court leet, within and for the hundred of *Whitchurch*. That at such court leet, two persons being *resiants* within the hundred, from time whereof the memory of man is not to the contrary, have, by the jury sworn at such court leet, been annually chosen to serve the office of *constables* of the said hundred.—That the manor of *Wootton Abbots* extends into and comprehends two *tythings* and no more; one of which *tythings*, from time whereof the memory of man is not to the contrary, hath been and is within the hundred

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dred of *Whitchurch*; the other within and parcel of another hundred.—That, from time whereof the memory of man is not to the contrary, there hath been and is a court leet within the manor of *Wootton Abbots*, at which court, the resiants within the said two tythings from time whereof, &c. have done suit and service, and have been chosen tything-men of the said tythings. That there have been, *time out of mind*, and yet are eighteen other tythings, within the said hundred; and the resiants of those tythings, *from time whereof*, &c. have done suit and service at the court leet of the hundred; and served as jurymen there, and been eligible, elected, and served as constables of the hundred: And that for twelve of the said eighteen tythings, resiants therein from time whereof, &c. have annually been chosen in the court leet of the hundred to be tything-men.—That by *ancient custom* the resiants of the tything of *Wootton Abbots* have been chosen and served as jurymen in the leet of the hundred; and have been elected by the jury of the court-leet of the hundred to be constables of the hundred, and have by such *ancient custom* served as such. That the defendant at a court leet holden, &c. for the hundred, was elected constable of the hundred, but not being present, the steward made his certificate, &c. &c. *prout* the indictment.' The question, for the opinion of the court upon this special verdict, was, whether the defendant was exempt from serving the office of constable of the hundred of *Whitchurch* by reason of his then being a resiant, and an inhabitant of and within the tything of *Wootton Abbots*, being a private leet within the leet of the hundred of *Whitchurch*?

This case was first argued in last *Michaelmas* term, by Mr. Serjeant *Davy* for the prosecutor, and Mr. Serjeant *Burland* for the defendant: And again this term, by Mr. *Dunning* for the prosecutor, and Mr. Serjeant *Glynn* for the defendant.

For the prosecutor it was argued, that the defendant was not exempt. The offices of tythingman and constable are not incompatible; because the duty of both is the same, only the former is circumscribed within narrower limits; and in this case, the one jurisdiction is within the other. As to the objection that no man is obliged to do suit at two leets, the obligation on the defendant to do suit as tythingman one day in a year, might be an excuse for his not attending the hundred court that day; but it would be singular to say, that the obligation of attending elsewhere, one day in a year, should exempt from serving the office of constable which is *annual* and *perennial*. But the

the office of constable is no suit at all, therefore he is liable.— Tenants in ancient demesne are exempt from *suit*, from serving the office of jurymen or attending the court leet, and yet are liable to serve the office of constable. 2 *Show.* 75. 1 *Ventr.* 344. *F. N. B.* 161. 376.

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In 3 *Keb.* 230. *Rex versus King*, Lord *Hale* says “regularly “ a man who owes suit to the leet, owes none to the hundred; “ but chusing constables is no article of the leet, and therefore “ the hundred shall not be excluded as to this.” In *Freeman*, 348, 349. S. C. Lord *Hale* is made to use the same expression; “ that “ the constable of an hundred is an article that the inferior leet “ cannot meddle in.” But the case of the *Queen versus Jennings*, 11 *Mod.* 215. is in point. There upon a special verdict the question was, whether the defendant, being an inhabitant of a particular leet, was excused from serving as high constable of the hundred? and the court held, he was *not* excused. In 3 *Keb.* 230. Lord *Hale* adds, “ that by *custom* a man who owes suit to the leet “ may likewise owe suit to the hundred:” Here such a custom is found. Therefore the defendant is liable.

For the defendant it was insisted, *contra*, that he was exempt. 1. Formerly all residents were obliged to attend the leet of the hundred: but that being found inconvenient, by sending husbandmen to a distance from their home, the king granted inferior leets; and from that time it was held, that no man should be bound to do suit and service at *two* different courts. Lord *Coke's Com.* on *Magna Charta.* c. 35. 2 *Inst.* 71. and on stat. *Marlebridge*, c. 10. 2 *Inst.* 122. “ If a man hath a house “ within two leets, he shall only do suit where his person is “ commorant; and where his bed is, there he shall be said to be “ commorant.” So in *Dalton's Sheriff*, 402, 403. and 2 *Hawk. Pl. C. c.* 11. *sect.* 3. “ no man is obliged to attend two leets, “ at the same time, in the same respect.” 2. If he does not owe suit and service to the superior leet, he is not compellable to take upon him any of the offices of the superior leet. As to the case of *Rex versus King*, 3 *Keb.* 230. and *Freeman* (a), 348, 349. they are books of no authority, nor is the case to be found in any contemporary reporter. They make Lord *Hale* talk unintelligibly with respect to the difference between borough and upland towns; and even contradict himself in saying, “ that “ constables were before the statute;” whereas in 2 *Pl. Cor.* 96.

(a) Lord *Mansfield* said, that some of the cases in *Freeman* were very well reported.

he

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REX
versus
GENGE.

he expressly says, "they were introduced by the statute of *Win-*
"ton."—11 *Mod.* is likewise a book of no authority: And it is
no reason, because the Lord, as it is there said, may sit in the
leet, that a private man may be chosen constable. 3dly. As to
the custom, no such custom is found, nor was meant to be found,
as appears from the different expressions used in the verdict.
For, with respect to the *manor*, the custom is found to be *time*
out of mind, and the jury find it in all its parts. But with re-
spect to the *tything* of *Wootton Abbots*, they only find that by
ancient custom the resiants have been chosen, and by such ancient
custom have served the office of constable of the hundred; but
they do not find any obligation on them, or that any one was
ever compelled to serve. Therefore it is a finding of evidence,
not of facts: and if the finding be imperfect, it ought to be
tried again.

Lord *Mansfield*. There is no authority or *dictum* whatsoever,
by which it is held, that a resiant within a leet, within the
hundred, is excused from serving the office of constable of the
hundred. Again, where there is a custom of the sort stated
in this special verdict, there is no authority which says that such
a custom is not good. On the other hand, there is an express
authority of a case of *Rex versus King*, reported in two books,
each of which states the case in the same way. It is ob-
jected, however, that these are books of no authority: but
if both the reporters were the worst that ever reported, if
substantially they report a case in the same way, it is demon-
stration of the truth of what they report, or they could not
agree. Here they agree in Lord Chief Justice *Hale's* saying,
"that the choice of a constable is no article of the business of a
"leet," and that it is no excuse that the party is within the ju-
risdiction of another leet. Another authority, in 11 *Mod.* 215,
which is very particular and strong, lays down the same doctrine.
And further, Lord *Hale*, according to 3 *Keble* 230, adds, that if
generally excused, yet by *custom* one may be liable. Here a
custom is found by the verdict: But an objection is taken to the
manner of finding it. I should have thought, between these
parties, the merits would have been tried without any cavil.
The case comes before us upon a *special verdict*, which states,
"that there has been a court leet from time whereof, &c. and
"that two persons from time whereof, &c. have been chosen,
" &c." and therefore, when it afterwards says by "*ancient custom*,"
it must mean such custom as beforementioned, which is "*immemorial*."

memorial." I think no man can doubt of what the jury meant, and I think the words they have used convey their meaning. Therefore I am of opinion that the custom is sufficiently found.

Aston Justice. Ancient custom in this case is immemorial custom; and I agree with my lord in thinking that such was the meaning of the jury. As to the party being exempt from serving one office, on account of his obligation to discharge the other, it is only meant that he is not liable to do it in the same manner, at the same time, in the same respect. But the office of constable of the hundred, according to Lord *Hale*, is not an article within the jurisdiction of the leet.—He observed that the doctrine in *Rex versus Bettefworth*, 2 *Show.* 75. was well warranted.

Mr. Justice *Willes* and Mr. Justice *Ashurst* concurred. Judgment for the king.

1774.
—
REX
versus
GENCE.

JONES *versus* RANDALL.

THIS was an action upon a wager, whether a decree of the court of *Chancery* would or would not be reversed in the house of lords? Verdict for the plaintiff, damages fifty guineas.

Upon a rule to shew cause, why there should not be a new trial in this case, three objections were made to the sufficiency of the evidence given at the trial. 1st. That a *copy* of the reversal only, and not the minute book itself, was produced. 2dly. If such copy was admissible, yet it ought to have been upon *stamps*. 3dly. That the *previous* proceedings ought to have been shewn, whereas the *decree only* was produced.

Lord *Mansfield*. The minutes of the judgment are the solemn judgment itself: not a word is added upon the journals: and a *copy* of them may certainly be read in evidence; for the inconvenience would be endless, if the journals of the house of lords were to be carried all over the kingdom. As to such copy being upon *stamps*, it was decided in Queen *Anne's* time by the opinion of all the judges of *England*, that copies of the proceedings of parliament need not be *stamped*. Formerly a doubt was entertained, whether the minutes of the *House of Commons* were admissible, because it is not a court of record; but the journals of the *House of Lords* have always been admitted, even in criminal cases.

Monday,
Feb. 7th,
1774.
In an action upon a wager, whether a decree of the court of *Chancery* would be reversed on appeal to the House of Lords, proof of the decree and reversal is sufficient without shewing the previous proceedings below — A copy of the judgment of reversal is admissible, and need not be stamped.

1774.

JONES
versus
RANDALL.

Aston Justice. They were so in *Rex versus Oates. State trials, Vol. iv. p. 44. et vide page 38.*—As to the previous proceedings, the court held there was no necessity to shew them; for the single fact in issue at the trial was, “whether the decree of the court “of *Chancery* was reversed,” not what the previous proceedings were: and therefore proof of the *decree*, and of its being *reversed*, was clearly sufficient. The rule was accordingly discharged.

The next day, Mr. *Dunning* moved in arrest of judgment upon two grounds.

First, that the event was not contingent, but *certain*: *Secondly*, that the contract was *illegal* upon the face of it, being *contra bonos mores*. *Vide infra, 37.*

Wednesday,
Feb. 9th.

ROWLAND versus VEALE, and others.

In Justification by process out of an inferior court, the plea stated “that the plaintiff below levied his complaint, in a plea of trespass on the case; for a cause of action arising within the jurisdiction of the court;” and held well enough, without setting forth the cause of action, or that the defendant became indebted within the jurisdiction.

THIS was an action of trespass, assault, and false imprisonment. Plea as to the trespass and assault, not guilty: And as to the imprisonment, a special justification.—“That “within the fee of *Trematon* in the counties of *Devon* and “*Cornwall*, there is a certain court of record holden at the “castle of *Trematon*, within the said fee of *Trematon*, from three “weeks to three weeks: and that at a certain court held, &c. “the said *Andrew Veale* levied his certain complaint against the said “*Thomas Rowland*, in a certain plea of trespass upon the case, “for a cause of action personal arising within the jurisdiction of “that court; and thereupon such proceedings were had, &c. “that afterwards, &c. it was considered by the said court, that “the said *Andrew* should recover against the said *Thomas Row-* “land 14 l. 1 s. for his damages, &c. Upon which, &c. a “certain precept in writing issued, &c. directed to the bailiff of “the court of the said fee, and also to the said *Thomas Dunn* and “*Robert Barnaford* ministers of the said court, commanding “them to take the body of the said *Thomas Rowland* and deliver “him to the keeper of, &c. to be by him safely kept, so that “the said keeper might have his body, &c. at the next court to “be there held, &c. after the date of the said precept, &c. “which said precept, the said *Andrew* delivered to the said “*Thomas Dunn*, and *Robert Barnaford*, requiring them to execute the same: Whereupon the said *Thomas Dunn* and “*Robert Barnaford* afterwards, &c. took and arrested the said

"*Thomas Rowland*, and delivered him to the keeper, to be by
 "him securely kept, so that he might have his body, &c.
 "at the next court, to be there held after the date of the said
 "precept."

1774.

 ROWLAND
 versus
 VEALE.

To this plea there was a special demurrer, which came on to be argued last *Michaelmas* term, when the court took time to consider; and now Lord *Mansfield* delivered the opinion of the court as follows:

Three exceptions have been taken to the defendants plea of justification. The *first* is, that the defendants have not sufficiently set out the cause of action, but have only said that the plaintiff below, *levied his plea*, in a plea of trespass on the case; nor have they set forth that the present plaintiff became *indebted within the jurisdiction* of the court. *Secondly*, it is not alleged that the *precept* for taking the body was ever *returned* to the court. And *thirdly*, that the writ was void, for that a *certain day* of return was *not shewn*.

With respect to the *first*, "that the *plea* is set out too generally", let us consider, what a plea in an inferior court is. In *Lilly's Practical Register*, fol. 195. a plea is in the nature of an original writ: the form is there said to be thus: "*A. B. queritur versus C. D. de placito transgressionis, et sunt plegia de proseq. scilicet, John Doe et John Roe.*" Here the plea is set forth as in *Lilly*.—In *Wade versus Hatcher*, *Lev. Ent.* fol. 176. the plea is set out thus, "*levavit quandam querelam suam versus defendentem de placito transgressionis super casum taliterque superinde processum fuit.*" This differs from that, only in alleging that the damages were ascertained by the recovery. In 2 *Lut.* 914. the plea is set out in the same general manner.

Formerly, the courts of *Westminster-Hall* were much more strict in regard to the setting out proceedings of inferior jurisdictions; and nothing was to be presumed in favour of their regularity: nor was it allowable to set them out with a *taliter processum est*: but these objections in point of form, have, of late years, been over-ruled in order to come at the real merits: And so it was determined in 2 *Lev.* 81. *Doe and Parmiter*. *Hil.* 24 & 25 *Car.* 2. The same doctrine is likewise laid down in 1 *Ld. Raymond* 80. upon the authority of 2 *Lev.* 81. though it is there said, that the old books were to the contrary. But this objection as to the plea is fully answered, and the law settled, in 2 *Mod.* 195. *Higginson versus Martin*, upon a plea

1774.

ROWLAND
versus
VEALE.

If the cause of action does not arise within the jurisdiction, the defendant must avail himself of it by plea in the court below: or, if not alleged in the plea below to be within the jurisdiction, it will be bad on writ of error or false judgment.

of justification to an action of trespass and false imprisonment, setting forth generally "that a plaint was entered in *placito transgressionis* in the court of *Warwick* with a *taliter processum*;—exception was taken that it was not set forth what kind of trespass it was; but the court held it was well enough. As to the latter part of this objection, "that it is not stated in the plea, that the plaintiff became indebted within the jurisdiction," the same liberality is to hold. For if the cause of action did not arise within the jurisdiction, the defendant should have availed himself of it by plea in the court below: or, if it was not alleged in the plea below to be within the jurisdiction, it would have been bad on error, or writ of false judgment, and so he might have taken advantage of it: but as he has taken neither of these methods, the presumption is, that the cause of action did arise within the jurisdiction. This very objection was taken in the case of *Titley versus Foxall, Trin. 31 Geo. 2. in C. B.* and over-ruled. That was a plea of justification to an action of false imprisonment, under process for a debt issuing out of the *Borough Court of Shrewsbury*; and there it was laid as here, "that the defendant levied a plaint in a plea of trespass for a cause of action, arising within the jurisdiction of the court." *Objected*, that it did not appear that the cause of action arose within the jurisdiction, or that the defendant became indebted there. The court said, it was necessary it should appear that the cause of action did arise within the jurisdiction; but in the case before them it did appear as strongly as possible; for it was stated, "that he levied a plaint in a cause of action arising within the jurisdiction." So here, it is expressly set forth that the plaint was for a cause of action arising within the jurisdiction of the court.

Where it is under process of execution, it need not be shewn that the precept was returned; otherwise in *mesne process*.

With regard to the *second* objection, the distinction which has prevailed as to the necessity of stating that the writ was returned or not, is between a *capias* upon *mesne process*, and a writ of execution. To a *capias* upon the former, the return of the precept must be set forth: but in the latter case it is unnecessary. The cases in point are *Doiley versus Joliffe, Lane 52.* and *Hoe's case in 5 Rep. 90.* where the reason assigned, why upon execution the return need not be set forth, is, that after execution, the plaintiff has had the effect of the suit. But if the *capias* in process be not returned, the arrest is *tortious*; for there the object of the writ is to enforce the appearance of the party. The case cited at the bar, *2 Rol. Abr. 563. pl. 18.* was upon

mesne

mesne process.—*Freeman* versus *Blewitt*, 1 *Salk.* 409. was a plaint in replevin entered in the sheriff's court in *London*, and pleaded by the defendant as serjeant at mace. Upon demurrer it was objected, that the precept was not returned; and the exception was allowed, because the writ is a returnable process, and the serjeant at mace a principal officer: otherwise, where the justification under a process is by a subordinate officer.—In 2 *Mod.* 59. which I shall presently cite at large, one of the objections was, that it was not alleged that the precept was returned; but the court held that the officer was not punishable though he did not return the writ.

1774.

 ROWLAND
versus
VEALE.

The last objection that has been taken in this case is, that the writ is void not being returnable on a day certain, but generally, at the next court. Now it is stated in the present justification that this court is holden from three weeks to three weeks, and that this is an execution against the body, not a writ upon *mesne process*. In support of this objection, *Cro. Car.* 254. *Dyer* 262. b. pl. 33. *Cro. Jac.* 314.—2 *Bul.* 36.—1 *Mod.* 81. were cited, but all these are cases upon *mesne process*, imparlance, or continuance. But in *Freeman* 319. *Hil.* 1673, on a writ of false judgment to reverse a recovery suffered in an inferior court, amongst many exceptions, one was, that there is an imparlance *ad proximam curiam tent.* and doth not say *scil.* such a day; and cited 1 *Rol. Abr. tit. Continuance*, 484. pl. 7. *Cro. Car.* 274. S. C.—But it was answered, that admitting it be error, yet all errors of that nature are salved by the parties appearance. In 38 *E.* 3. 2. *Brok. Contin.* 48. 2 *Crok.* 284. it is laid down 'that a miscontinuance of a process is well aided by appearance of the parties; as where one process is awarded for another, or misreturned.' The reason given in 2 *Bul.* 36. and *Cro. Jac.* 314. why a writ returnable at the next court generally, is not good, does not hold in the case of an execution; for there the ground of it was this; that otherwise the party may be detained forty years, before any court is held. It ought therefore to have been shewn for certain, when the court was to be held; though it was there alleged, that it appeared by their jurisdiction, that the court was held *de die in diem*; And yet the court were of opinion that the plea was ill.

The court was held from three weeks to three weeks, and the writ was, to have the body at the next court, generally: it is good; and a day certain need not be shewn.

But the last case in order of time has departed from this rule of shewing a day certain, even upon *mesne process*: And that is the case of *Crowder v. Goodwin*, 2 *Mod.* 58, 59. *Mich.* 27 *Car.* 2. and was thus: In assault and battery and false imprisonment, there was a justification by process out of an inferior

1774.

ROWLAND
versus
VEALE.

court. Upon demurrer, several exceptions were taken to the plea; the second was, that the precept was to take the plaintiff, and have him *ad proximam curiam*, which was not good, for it should have been on a day certain. To this it was answered, that it was well set forth to have the plaintiff *ad proximam curiam*. The Chief Justice doubted, that upon this exception the plea was ill, but the three other judges held it good; and it was argued at the bar to be well set forth; for how can a return be upon a day certain, when the judge may adjourn *de die in diem*? But this case is much stronger than that, for here it is alleged upon the record that the court was holden from *three weeks to three weeks*; the day therefore was certain: *Nam certum est quod certum reddi potest.*

We are, therefore, all of opinion, that these three objections ought to be over-ruled, and judgment given for the defendant.

Thursday,
Feb. 10th.WORKMAN *versus* LEAKE.

An indorsee
of a promissory
note payable
three months
after date,
may be discharged
under an insolvent
act,
which takes
place before
the three
months are
expired:
for it is *debitum in presenti, solvendum in futuro.*

MR. Lucas had obtained a rule to shew cause, why the defendant should not be discharged upon filing common bail; the cause of action for which he was arrested, accruing prior to the insolvent act 12 Geo. 3. c. 23. which act took place, 1st of January 1772, and under which the defendant had obtained his discharge. The nature of the debt was as follows: The defendant had indorsed a note, dated the 28th of October 1771, drawn by one Hodgson, payable to the defendant, or order, three months after date; and at the same time he gave an undertaking to pay to the plaintiff a certain sum for goods then sold and delivered to the said Hodgson, on six months credit given for the said goods. The defendant was arrested upon the note.

Mr. Lucas in support of the rule cited *Lisle versus Jenyns*, 1 Barnes 81.

Mr. Justice Willes mentioned the case of *Macarty versus Barrow*, 2 Str. 949. where the defendant, who was the drawer of certain bills protested for non-acceptance, between the drawing and return became bankrupt; and being sued to execution moved to be discharged under the stat. 5 Geo. 2. c. 30. sect. 7. and was discharged accordingly.

Lord Mansfield. Upon the motion I doubted; but my clerk has since reminded me that upon application I have made twenty such orders.

The

The words of the stat. 12 Geo. 3. c. 23. sect. 27. are much larger than those of the stat. 5 Geo. 2. c. 30. sect. 7. which latter statute mentions only such debts as were *due* or *owing* at the time the party became bankrupt; whereas this statute extends to all debts, contracted, incurred, occasioned, owing, or growing due. I am clearly of opinion that this is *debitum in presenti, solvendum in futuro*: and consequently, being due on the 1st of January 1772, it is discharged under this act. Otherwise, if it had depended upon a *contingency*: because there, till the event happens, it is no debt.*

The three other judges concurred.

Per cur. let the rule be made absolute.

FREAME et UXOR *versus* PINNEGER.

MR. Morris shewed cause why an award should not be set aside, and at the same time moved to make absolute a rule for an attachment for the non-performance of it. His grounds against setting aside the award were two; 1st. That the application was too late, the award being a submission within stat. 9 & 10 W. 3. c. 15. sect. 2. which provides, "that any arbitration procured by corrupt or undue means shall be adjudged void, &c. so as complaint of such corruption, &c. be made in the court where the rule is made for submission to such arbitration, before the last day of the next term, after such arbitration made and published to the parties." In this case, the application was not originally made till *after* the expiration of that time. Therefore it is now too late. 2dly. Upon the merits.

Mr. Wallace, Mr. Mansfield, and Mr. Dunning, *contra*. That the objection to the award was within time; the application being made as soon as they were called upon by a motion for an attachment to enforce the award.

* N. B. In the case of *Paget versus Wheate*, Easter term 21 Geo. 3. the same point occurred. That was an action upon a bond bearing date the 21st of September 1777; Plea, insolvent debtors act, 18 Geo. 3. c. 52. and that the cause of action was contracted before the 28th of January, 1778, when the act took place. Replication setting forth the condition of the bond, by which it appeared it was conditioned for payment on the 21st of September 1778. To this the defendant demurred. The question was, whether the bond was discharged? The court took time to consider; and afterwards, in the same term, Lord Mansfield delivered the opinion of the court, that the bond was discharged, upon the authority of the above case of *Workman versus Leake*.

1774.

WORKMAN
versus
LEAKE.

Saturday,
Feb. 14th.

Motion to set aside an award must be made before the last day of the next term after such award is published; otherwise it is too late; and an attachment for the non-performance of it may issue.

1774.

FREAME
versus
PINNEGER.

Lord *Mansfield* after stating the clause and proviso in the statute observed, that though the first clause was inaccurately penned, yet the meaning of it was sufficiently explained by the proviso in section 2. and said, he was extremely clear from the words of the proviso, that the time of objecting to an award is expressly limited to the last day of the term next after it is published. He was equally clear, that where no objection is made within such limited time, the other side may apply for an attachment to enforce the performance of the award. In this case the impeachment of the award being subsequent to the time prescribed by the statute, was therefore too late: And the motion for an attachment clearly regular.

The court ordered the rule for setting aside the award to be discharged, but without costs: And that the attachment should lie in the office a month after bringing in the money before the master.

Same day.

 REX versus SMITH.

No certiorari
lies on the
stat. 30 G. 2.
c. 24.

MR. *Davenport* had moved for a *certiorari* to the justices of *Middlesex* to remove an indictment against the defendant upon the statute of 30 Geo. 2. c. 24. for the more effectual punishment of persons obtaining goods or money under false pretences, &c. he said, it was a doubt whether a *certiorari* would lie: and now, upon shewing cause, the court were clearly of opinion it would not.

Same day.

 GOLDING *qui tam* versus BARLOW.

Quere, if an
informer in
a *qui tam*
action shall
be obliged to
give security
for costs?

MR. *Selwyn* had obtained a rule for the plaintiff in a *qui tam* action, to give security for the costs upon affidavit of the lowness of his circumstances.

Mr. *Dunning* now shewed cause, and insisted that this was not the practice. And Lord *Mansfield* said, that the court would not do it in the case of a foreigner's* being a plaintiff; nor in matters of property, except in ejectment, where the lessor of the plaintiff is an infant. But the question in this

* *Vide* 2 Str. 1206. *Real et al. v. Macky*, where the court refused to stay the proceedings in the case of a foreigner, *et pass.* *Nuncomar v. Burdett*, Mich. 15 Geo. 3. where it was refused upon motion in the first instance, as a settled point.

case was put an end to by an affidavit, stating the plaintiff to be a person of property. Whereupon the rule was discharged.

1774.

GOLDING
versus
BARLOW.

BOUTEFLOUR versus COATES.

Same day.

UPON a rule to shew cause why the defendant, who was a bankrupt and had obtained his certificate, should not be discharged, the short state of the case was, that in a former action against the defendant, he had given a bail-bond to the sheriff, which was forfeited before the commission, by non-appearance. The present action was brought upon this bail-bond, and the defendant had obtained his certificate under the commission, but the judgment was not obtained till after the certificate allowed.

A certificate discharges a bankrupt from a debt accruing before the commission tho' judgment be not obtained till after the certificate allowed.

Mr. *Mansfield* for the defendant, Mr. *Wallace* for the plaintiff.

Lord *Mansfield*. Here was a breach, and the penalty forfeited; therefore the debt was due, though execution could not be taken out for more than the damages. It is not the case of a contingent debt, not reduced to a certainty; which is not discharged by the certificate.

The three other judges were of the same opinion. Rule made absolute.

EASTER TERM

1774.

14 GEORGE III. B. R. 1774.

Thursday,
April 21st.REX *versus* CROKE.

Where by
statute, a
special au-
thority is
delegated
to particu-
lar persons,
affecting
the property
of individ-
uals, it
must be
strictly pur-
sued; and
appear to
be so upon
the face of
their pro-
ceedings.

BY stat. 9 Geo. 3. c. 89. entitled "an act for making a road
" from *Blackfriars Bridge* across *St. George's Fields, &c.*" a
power is given to the *mayor, aldermen, and commons in common
council assembled*, to treat with the owners, and occupiers of,
and other persons interested in such houses, lands, and tenements,
as shall be necessary to be purchased for the purposes of the act,
for the purchase of the same: And it is enacted, "that all bodies
" politic, &c. and every person possessed of, or interested in, any
" lands, &c. which, by the said *mayor, aldermen, and commons in
" common council assembled*, shall be thought necessary for any of the
" purposes of the act, shall have power to sell and convey any of
" such lands, &c. to the *mayor, commonalty, and citizens of the
" city of London*. And in case of refusal or inability to treat,
" then the justices of the county of *Surry* at their quarter sessions,
" or at any adjournment, are required upon application of the
" said *mayor, aldermen, and commons in common council assembled*,
" or of any persons on their behalf, to issue a precept to the
" sheriff to summon a jury, who are to assess the value of
" such lands, and of the proportionable value of the respective
" estates and interests claimed therein, notice in writing having
" been previously given to the persons interested, at least
" fourteen days before, and left at the dwelling-house or usual
" place of abode of such person, or with some tenant of such
" lands, &c." and it is further enacted, "that all and every
" person and persons, who shall have any mortgage or mort-
" gages on such lands, tenements, and hereditaments, not
" being

“ being in possession thereof by virtue of such mortgage or
 “ mortgages, shall, on the tender of the principal money and
 “ interest due thereon, together with six months interest of
 “ the said principal money, by the said mayor, aldermen, and
 “ commons, in common council assembled, or by any person or
 “ persons whom they shall appoint, immediately assign such
 “ mortgage or mortgages to the said mayor, and commonalty and
 “ citizens, or such person or persons as they shall appoint in
 “ trust for them; or, in case such mortgagee or mortgagees
 “ shall have notice in writing from the said mayor, aldermen,
 “ and commons in common council assembled, that they will pay
 “ off and discharge the principal and interest, which shall be
 “ due on the said mortgage or mortgages, at the end or ex-
 “ piration of six calendar months, to be computed from such
 “ notice given; that then, at the end of the said six months,
 “ on payment of the principal and interest so due, such mort-
 “ gagee or mortgagees shall assign his, her, or their interests in
 “ the premises to the said mayor and commonalty and citizens,
 “ or such person or persons as they shall appoint in trust for
 “ them; and in case such mortgagee or mortgagees shall refuse
 “ to assign as aforesaid, on such tender or payment, then all
 “ interest on every such mortgage, shall cease and deter-
 “ mine.”

1774.

 REX
 versus
 CROKE.

The defendant, being a mortgagee out of possession of a greater quantity of land than the commissioners wanted, had insisted that he was entitled under the act to the whole of such mortgage money. The city refused to comply with this demand; whereupon a jury was empannelled, and the quarter sessions, upon a hearing, made the following order.

Surry, to wit. “ BE it remembred that in pursuance of an
 “ act of parliament made in the 9th year, &c. at a general quar-
 “ ter sessions of the peace, &c. holden, &c. at Southwark, &c.
 “ before Joseph Mawby, &c. justices, &c. assigned to keep the
 “ peace in the county aforesaid, &c. upon application being
 “ made, &c. by and on behalf of the mayor and commonalty and
 “ citizens of the city of London, the said court did issue a precept,
 “ directed to the sheriff of, &c. to empanel, &c. a competent
 “ number of persons qualified to serve on juries, &c. to in-
 “ quire and assess upon their oaths, the value of all that piece
 “ of ground in the tenure or occupation of George Holroyd, and
 “ of the proportionable value of the respective estates and interests
 “ claimed therein, or in any part thereof, so that the said court
 “ might

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“ might give such judgment thereupon, as in and by the said
 “ act they *were* authorised to give, and they lawfully *might*, to
 “ the end that the said ground and premises, and the several and
 “ respective estates and interests therein, might be vested in the
 “ *mayor and commonalty and citizens* of the said city of *London*,
 “ in and for the purposes in the said act mentioned : And after-
 “ wards, to wit, at an adjournment. &c. out of such persons, a
 “ jury of twelve persons *are* drawn, to inquire of the value of
 “ the said premises, and of the proportionable value of the re-
 “ spective estates and interest claimed therein, or in any part
 “ thereof; who having proceeded to hear evidence given upon
 “ oath duly administered by the said court, and what is alleged
 “ by the council on behalf of the *mayor and commonalty and ci-*
 “ *tizens* of the said city of *London*, and on proof upon oath of
 “ *due notice* having been given to *Benjamin Croke, &c. of Primrose*
 “ *Street, &c.* a mortgagee or assignee of the premises, of this
 “ application to the court, for their verdict upon their oaths,
 “ say, that the estate and interests in the said premises for and
 “ during the remainder of a lease, of amongst others the said
 “ premises claimed by the said *Benjamin Croke* as a mortgagee
 “ or assignee thereof, of which lease there were four years un-
 “ expired at *Michaelmas 1772*, are of the value of 200 *l.* There-
 “ fore it is considered and adjudged by the said court, that the
 “ said sum of 200 *l.* so found by the said jury in manner afore-
 “ said, be the *value* of the *said estate and interest*; and they do
 “ assess and award, that the same be paid for the purchase there-
 “ of, to the said *Benjamin Croke*, or to *such other person* or persons
 “ as is or are *seised* of or *interested* in the same, according to his
 “ and their *respective* estates or interests therein, on making
 “ out a good title to the same, and executing proper convey-
 “ ances and assignments thereof, to the *mayor and commonalty* and
 “ *citizens* of the said city of *London*.”

This order being removed by *certiorari*, Mr. *Bearcroft* on the part of the defendant, took four exceptions.

First, it is not stated that the “ *mayor, aldermen, and commons* “ *in common council* assembled,” have adjudged these lands to be necessary for the purpose. *Secondly*, It is stated, that the application was made by the *mayor, commonalty, and citizens*, instead of being made by the “ *mayor, aldermen, and commons in common coun-* “ *cil* assembled,” as the act directs. *Thirdly*, it is not stated, whether the defendant is a mortgagee in or out of possession, but only that he is a mortgagee: which is uncertain and insufficient, because

because a special provision is made by the act with respect to a mortgagee out of possession, which provision has not been complied with in this case. *Fourthly*, that though the proceedings appear upon the face of them to have been at different times, they are all stated in the past, instead of the present tense, which is fatal: because all proceedings before justices, being supposed to be entered at the moment, ought to be in the present tense. And he cited *Ld. Raym. 1347. Rex v. Roberts, 1 Str. 608.* same case, as an authority in point.

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To this it was answered by Mr. serjeant *Glynn* for the prosecution, 1st. That there is no need of any act of the mayor, aldermen and commons, in common council assembled, adjudging that the lands are necessary to be purchased; for they are the persons who apply to purchase the lands, and therefore of necessity appear to adjudge them necessary to be purchased. 2dly. The application by the mayor, commonalty, and citizens is well enough, for they are the corporation, and include the mayor, aldermen, and commons in common council assembled, who are the representatives and the acting part of the corporation. 3dly. It is immaterial to state whether the mortgagee was in or out of possession, for in either case he has an estate and interest; therefore the sessions had jurisdiction; and the act does not require that a tender should be made of the whole mortgage money, but only for such part as shall be necessary for the purposes of the act. 4thly. The stating a past transaction is more properly expressed in the past, than in the present tense.

Lord Mansfield. This is a special authority delegated by act of parliament to particular persons, to take away a man's property and estate against his will; therefore it must be strictly pursued, and must appear to be so upon the face of the order.

Several objections have been taken to this order in point of form, which are material. 1st. That the mayor, aldermen, and commons, in common council assembled, have not given an opinion, that the lands are necessary to be purchased, nor that an application was made by them to the justices, but that an application was made by the mayor, commonalty, and citizens. Now they are two distinct things; the one is a select body, the other is the corporation at large: and we cannot here go into any fact tending to reconcile such distinction, or to shew that in truth the latter are the proper persons. But it ought to have been stated, that the mayor, aldermen, and commons, in common council assembled, had given such opinion; and that an application had been made by them to the justices.

The mayor, aldermen, and commons in common council assembled, are not sufficiently described by the mayor and commonalty and citizens, tho' in fact the latter include the former.

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If a particular form of notice be prescribed, it must be fully set out and precisely pursued: An allegation that *due notice* was given is not sufficient.

The adjudication must follow the provisions of the act.

There is another objection in point of form, which is not mentioned at the bar; which is, that the order does not state that a *notice* was given in writing to Mr. Croke according to the requisites specified in the act; but only says "upon proof of *due notice* having been given to him," which is insufficient, a particular notice being specified by the act.

As to the case upon the merits, it appears, that the defendant is a mortgagee out of possession of this piece and of some other lands for a term of years of which four only are to come. Now the act has made an *express* provision in the case of a mortgagee out of possession, and has directed, that upon payment of principal, interest and costs, the mortgagee shall make an assignment of his mortgage. The reason seems to be this; that there can be no account to settle between mortgagor and mortgagee; and no injustice is done in respect of the mortgagor; because the mortgagee might always assign to any other person. As to a mortgagee in possession, the act is totally silent. But the city, instead of proceeding upon the clause abovementioned, have considered the defendant as a proprietor having an interest in the whole land: besides, the mortgagor is not summoned, nor made a party, nor is any sum adjudged to him; and instead of fixing the value and proportion of each respective interest, they have adjudged that the 200 l. shall be paid to the defendant, or to such other person as shall be seized, &c. according to their interest. Who that person is, or what proportion he is entitled to, does not appear. Therefore both in point of substance, as well as in form, this order is greatly defective.

We desire not to be understood to give our opinion that the city may not proceed against the mortgagor and mortgagee as persons interested under the *first* clause; but then they must both be joined.

A defective notice is not cured by the appearance of the party.

Aston, Justice. This order is very defective. The want of notice to the mortgagor is very material: and with respect to the mortgagee, the notice required by the act ought to have been fully set out, and precisely pursued: and it is not cured by his appearance.

The adjudication and award of the value, does not answer the direction of the act; which says, that judgment may be given of the *respective* interests; whereas this order is to pay the 200 l. to the defendant, or such persons as shall be interested therein:

This

This is no apportionment or declaration of the respective interests; and therefore it is insufficient.

Mr. Justice *Willes* and Mr. Justice *Asbhurst* concurred.

Per Cur. Let the Order be quashed.

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WRIGHT *versus* HOLFORD.

Friday,
April 22d.

THIS was a case out of Chancery upon the construction of a will, and the material facts were as follow;

Devise "to the use of all and every the daughter and daughters of &c. and the heirs of their body and bodies; such daughters, if more than one, to take as tenants in common, and not as joint-tenants; and for default of such issue, to the use of the testatrix's right heirs." The daughters take cross remainders.

That by articles of agreement bearing date the ——— day of ——— 1755, and entered into in consideration of marriage, the testatrix *Constantia Maria Holford* was empowered to dispose from time to time by deed, attested by two witnesses, or by will duly attested by three witnesses, of such estates as should come to her during her coverture. In the same year the marriage was had; and on the 21st of *April* 1758, upon the death of her uncle, who was tenant for life of the estates in question, she became entitled by descent, as co-heir, to one undivided moiety of the said estates. On the 3d of *May* 1758, she made her will, and appointed "All her said undivided moiety, to trustees, to the use of her husband *Peter Holford* for life, with limitation to preserve contingent uses, remainder to her sons to be begotten on her body, and in default of such issue, to the use of all and every the daughter and daughters of the said *Peter Holford*, and her the said *Constantia Maria Holford*, lawfully to be begotten, and to the heirs of their body and bodies; such daughters, if more than one, to take as tenants in common, and not as joint-tenants; and for default of such issue, to the use of her right heir."

The testatrix died, leaving *John Wright* her heir at law; and leaving by her second husband, two daughters, *Constantia* and *Catherine*: *Constantia* died at the age of two years; *Peter Holford*, *John Wright*, and *Catherine Holford* living. The question for the opinion of the Court was, Whether on the death of the daughter *Constantia Holford*, without issue, the plaintiff, *Wright*, as heir at law, became entitled to the share of the estate of *Constantia Holford*; or whether there were cross remainders between the daughters.

Mr. Serjeant *Hill*, on behalf of the plaintiff, the heir at law, stated it to be a principle of law, as old as the time of *Hen. 7.* that

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an heir at law is not to be disinherited, but by an *express* devise or *necessary* implication: A probable intent or conjecture is not sufficient. 13 H. 7. 17. *b. Gardiner v. Sheldon. Vaughan* 262. 268. S. P. Therefore without such *express* devise, or *necessary* implication, no cross remainder could be raised in the present case. First then, as to *express* words, there can be no pretence of any in the devise in question. And secondly, There are no words from whence to infer by *necessary* implication, that it was clearly the intention of the testatrix to create cross remainders as between the daughters. On the contrary, the words are in substance the same as those in the cases of *Comber v. Hill*, 2 Str. 969. and *Williams v. Brown*, 2 Str. 996. in both of which the court was clearly of opinion against raising cross remainders. In *Comber v. Hill* the devise was "To Richard Holden and Elizabeth Holden, equally to be divided, and to the heirs of their respective bodies, and for default of such issue, to Ann Holden in fee." In *Williams v. Brown* the testator devised "to the use of all and every the child and children, both male and female, born and to be born of the body of Mehetabel, equally to be divided between them, and of the heirs of their respective bodies; for want of such heirs, remainder over." If these cases differ at all from the present, it is only in the addition of the word "respective," which if inserted here would have been superfluous; because by "*such issue*" is necessarily implied *respective* issue; and so it is laid down by Lord Cowper in *Cook v. Cook*, 2 Vern. 545, 6. "a devise to the testator's two daughters, and their issue; and in default of such issue to J. S. they have a joint estate for life, and several inheritances: if one of the daughters dies without issue there shall not be cross remainders: but her moiety shall go over to the remainder-man for want of *such issue*, i. e. *respective issue*."—Thirdly, In most of the cases where the implication has been raised, it has been in favour of the heir at law. It was so in the case of *Doe*, on the demise of *Burville v. Burville*, Pasch. 1773, R. B. for if the implication had not been raised, the estate would have gone from the heir at law. That consideration was likewise the principal ground upon which the case of *Holmes v. Meynell* was determined, T. Raym. 453. Sir T. Jones, 172. and the cases there cited; 13 H. 7. 17. 4 Leon. 14. pl. 51. and *Dyer*, 330. *Clache's* case supports the same doctrine. Fourthly, It is a rule, that cross remainders cannot be implied between more than two. In *Cro. Jac.* 656. a devise to three and the heir of their bodies, and in default of issue

issue remainder over, was held *not* to create cross-remainders. It is true, that in this case there were in fact only two; yet there might have been more, and therefore it is within the reason of the above principle. *Lastly*, a cross-remainder is never favoured in law, and so Lord *Hardwicke* held in 1 *Atkyns* 580; confirming at the same time the settled and established doctrine, that it can only be raised by an implication absolutely necessary. As all the cases therefore, where cross-remainders have been allowed, are either in favour of the heir at law, or under circumstances in which the estate would otherwise have gone from him, and as no certain intent appears in this case to raise them, the court will not imply them against the title of the present heir.

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Mr. *Hargrave* *contra* for the defendant. The expression "to all and every the daughter and daughters, and the heirs of their body and bodies," not only furnishes a *necessary* implication, but *expressly* creates cross-remainders as between them. For *first*, if there had been one daughter only, she would clearly have taken the whole estate by this devise, in exclusion of the heir at law; and of course it was impossible that the testatrix in the one case should intend to give her the whole, and in the other only half. Again, the words "in default of such issue," can neither be construed nor applied in any other manner than as relative to the issue of all and every daughter; which plainly shews that the reversion in fee was not to come into possession, but upon failure of issue of every daughter. In answer to the authorities, he cited a case *Mich. 13 & 14 Eliz. anon.* in *Dyer* 303. *pl. 49.* "The testator devised two parts of his estate to his four younger sons, and the heirs male of their bodies begotten, and if they all die without issue male of their bodies, or any of their bodies, the two parts were to revert to the right heirs of the devisor. Three of the younger sons died; and the court were of opinion, that the survivor had an estate-tail in the whole two parts." Again in 4 *Leon. 14. pl. 51.* cited by Serjeant *Hill*, it was in terms expressly adjudged, "that the eldest son should take the estate by the *implicative* devise." But he relied principally on the case of *Holmes* *versus* *Meynell*, *Raym.* 453. reported likewise in *Pollexfen* 425. as in point. The devise there was "to the testator's two daughters and their heirs, equally to be divided between them, and in case they happen to die without issue, then to his nephew *Francis* in tail."—And the court held, "that *Francis* took nothing till both were dead without issue." As to *Clacke's* case, it was determined upon the particular words which amounted to a special limitation of the

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estate of the testator himself; under which circumstances, the court held there could be no implication of a cross-remainder. So in *Dyer* 326. in the margin, it is said to have been held by the court, that if a devise be to two brothers in tail, and if they die to the daughter; if one dies without issue, it is no cross-remainder; because there is an express estate, and therefore it shall not be taken by implication.

With respect to the case of *Gilbert versus Witty* and others, *Cro. Jac.* 655. there were two reasons against implying cross-remainders in that case. The first, that it was a devise to three sons severally by express limitation; and secondly, because it is a universal principle, that there cannot be a cross-remainder by implication between more than two. With respect to *Comber versus Hill*, he took this distinction; that, in that case, the words "*all and every*" were omitted, and the word "*respective*" is not inserted in the case in question. The case of *Williams versus Brown* is rather stronger in favour of the plaintiff, the words "*all and every*" being there, made use of; but the chief ground upon which the court decided that case was the insertion of the word "*respective*." With regard to the case in *Atk.* 580. he said it was sufficient to observe, that the court determined it absolutely upon the expression in the will—to their "*several*" and "*respective*" issues.

The court took time to consider.—Afterwards, on *Monday* the 16th of *May*, Lord *Mansfield* delivered the opinion of the court, which he introduced as follows:

I found it a custom, in cases sent by the court of *Chancery* for our opinion, to certify it privately to the Lord Chancellor in writing, without declaring in this court either the opinion itself, or the reasons upon which it was grounded. But I think the custom wrong, as well as unsatisfactory to the bar: and therefore in the two cases that now wait our certificate, and for the future, we shall declare our opinion in this court.

Our certificate in the present case is in these words—"There are no words in the instrument, bearing date the 3d of *May* 1758, which intimate any intention to limit over the *respective* shares of the two daughters dying without heirs of their bodies *respectively*; on the contrary, the limitation over is of the whole estate, limited to all the daughters, and is to take place, on the express contingency of *failure of all and every* the daughter and daughters, and the heirs of their *body and bodies*; and the limitation over on default of *such issue* is, to the heir at law. Consequently we are of opinion, that as nothing is given

" given to the heir at law, whilst any of the daughters or their
 " issue continue, they must amongst themselves take cross-re-
 " mainders." 1774.

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N. B. Lord Mansfield added, that the introductory words of
 " there being nothing in the instrument of May 3d, 1758, which
 " shewed the limitation over to the right heir was to take
 " place upon failure of either of the daughters and their issue
 " respectively," were emphatically put in, in answer to the cases
 of *Comber versus Hill*, and *Williams versus Brown*, cited in the
 argument by Serjeant *Hill*; and in order to satisfy his doubts.

REX versus CLARKE.

Saturday,
 April 23.

THIS was a conviction upon stat. 33 Hen. 8. c. 9. sect. 16.
 in effect as follows:

One, con-
 victed of
 playing at
 bowls, upon
 the stat. 33
 Hen. 8. c. 9.
 sect. 16. is
 not punish-
 able as a
 disorderly
 person.

" Be it remembered, that on, &c. Samuel Poivey, and Stephen
 " Bulling of, &c. came before me William Codrington, one, &c.
 " and gave me to understand and be informed, that Thomas
 " Clarke of, &c. labourer, on the 16th of August 1773, did use
 " and play at a certain unlawful game with bowls and pins, called
 " bowltrushing, with divers liege subjects of our said lord the
 " king, and did then and there obtain and receive divers sums
 " of money of the said subjects playing at the said game, against
 " the form of the statutes in that case, &c. and against the peace,
 " &c. and pray that the said Thomas Clarke may be convicted of
 " the said offence: Whereupon afterwards, on the 8th of Sep-
 " tember 1773, the said Thomas Clarke being apprehended and
 " brought before me, &c. to answer to the said charge, &c.
 " the said Thomas Clarke is asked by me, if he can say anything
 " for himself why he the said Thomas Clarke should not be
 " convicted of the premises above charged upon him, &c. and
 " thereupon the said Thomas Clarke, of his own accord, fully
 " acknowledges the premises, &c. to be true as charged, and
 " does not shew to me any sufficient cause why he should not
 " be convicted thereof. Whereupon all and singular the pre-
 " mises, &c. being considered, and due deliberation being there-
 " unto had, I do adjudge and determine that the said Thomas
 " Clarke is guilty of the premises, &c. and that the said Tho-
 " mas Clarke is therefore an idle and disorderly person, and is also
 " therefore a rogue and vagabond, within the true intent and
 " meaning of the statutes in that case made and provided. And
 " the said Thomas Clarke is accordingly by me convicted of the

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" offence charged upon him in and by the said information,
" and of being an idle and disorderly person, and a rogue and
" vagabond in form aforesaid : and I do hereby adjudge and order
" that the said *Thomas Clarke* be therefore committed to the
" house of correction, there to remain for the space of *one month*,
" being a less time than until the next general quarter sessions
" of the peace ; or until the said *Thomas Clarke* shall find suf-
" ficient sureties to be bound in recognizance to appear before
" the next quarter sessions, and for his good behaviour in the
" mean time."

Mr. *Selwyn* last term took exception to this conviction, because it was not alleged in the information that the playing at bowls was out of the defendant's own orchard, and it is only unlawful *sub modo* : And the court upon this exception quashed the conviction.—Afterwards, in the same term, Lord *Mansfield* said, a doubt had arisen, whether, as by another part of the 16th section of stat. 33 *Hen. 8.* it is made unlawful for a labourer to play at any time out of *Christmas*, the conviction was not good ; as the defendant was stated to be a labourer, and the playing laid on the 16th of *August*. But, his lordship observed, the punishment appeared to be under the vagrant act, 17 *Geo. 2. c. 5. sect. 2.* therefore desired it might be spoken to again upon this new point, and also considered, whether it was a good adjudication under this latter statute.

And now Mr. Justice *Aston* (Lord *Mansfield* absent) delivered the opinion of the court.

This conviction is a jumble and confusion of charges and punishments. It is a conviction for playing at bowls, and the punishment inflicted is imprisonment as being an idle and disorderly person. The stat. 33 *H. 8. c. 9. sect. 16.* lays a penalty of 20*s.* on every labourer, &c. playing at bowls out of *Christmas*. The punishment therefore is clearly not under this statute. The stat. 17 *Geo. 2. c. 5. sect. 2.* describes four kinds of idle and disorderly persons : and being an explanatory act, we cannot go out of it. Now bowling is not an offence within any of these descriptions ; consequently the defendant is not punishable as an idle and disorderly person. But the punishment here is under this latter statute. Therefore we are all clearly of opinion that the conviction ought to be quashed.

Playing at
bowls does
not consti-
tute an idle
and disorderly per-
son within
the provi-
sions of the
stat. 17
Geo. 2. c. 5.

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NORRIS *versus* TYLER.*Same day.*

THIS was an action for a malicious prosecution in preferring a bill of indictment against the plaintiff for forging a note of hand. Four witnesses were called to prove that the hand-writing was not the plaintiff's, and the judge directed the jury in his favour: But the jury found a verdict for the defendant. Upon a motion for a rule to shew cause why the verdict should not be set aside, as being a verdict against evidence, and why a new trial should not be granted, the court said the defendant had been sufficiently tried once, where the suit was of a criminal nature.

In an action for a malicious prosecution, verdict in favour of the defendant refused to be set aside, tho' against evidence.

Motion denied.

JONES *versus* RANDALL and Another.*Monday, April 25th.*

ASSUMPSIT upon a wager, "Whether a decree of the court of Chancery would be reversed on appeal to the House of Lords." The decree was reversed; whereupon the plaintiff brought this action, and obtained a verdict for fifty guineas, the amount of the wager laid.

Action lies to recover money won upon a wager, "Whether a decree of the court of Chancery would be reversed or not on appeal to the House of Lords;" unless the motive be fraud or other turpis causa.

Mr. *Dunning* had moved in arrest of judgment: *First*, Because the event was not contingent, but certain; and *secondly*, because the contract was illegal, being *contra bonos mores*.

Mr. *Wallace* and Mr. *Mansfield* now shewed cause; 1. This was a fair transaction between the parties, whose knowledge, or rather ignorance, respecting the event, left it equally uncertain in whose favour it would finally be decided. Therefore, as between them, it was certainly contingent. 2. It is not within any of the statutes against gaming; and therefore, like all other bets which are not prohibited by positive law, recoverable by action. 3. With respect to its being illegal, there is no case in point; and therefore, if immoral, it must be decided to be so from the nature of the contract itself. But is it more immoral than a wager between two sons upon the lives of their respective fathers, which was the case of the Earl of *March v. Pigot*, Trin. 11 G. 3. B. R. and adjudged a good and valid wager? There is no fraud; no imposition imputed to either of the parties; no suggestion of any personal influence with respect to the de-

cision;

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cision; nor does it in itself import any *disrespect* to the judicature of the House of Lords, but was meant by the plaintiff merely as a sort of insurance upon his cause; therefore there is no ground to say that this contract is in its nature an illegal contract.

Mr. *Dunning*, in support of the rule, began by stating, that in *fact* it was an *usurious* bet to prevent the plaintiff being sent to gaol; but allowed that the court must decide upon the *record only*.

He admitted that this was not a case within any of the acts of parliament against gaming; nor did the idea of personal influence make any part of the ground of his objections: at the same time he insisted, that if such a wager had been laid by a member of the House of Lords, it would not have been competent to him to recover it. What was law therefore to one person, was law to every other person of whatever denomination.

But he said, the questions upon this motion are two: *First*, Whether this wager is fair? *Secondly*, Whether it is not void, as being contrary to *common decency*? It is essential to the validity of a wager that the event be *contingent*: But the laws of this country are clear, evident, and *certain*: All the judges know the laws, and, knowing them, administer justice with uprightness and integrity. The event therefore was certain, and of course the wager such, as in its nature was impossible to be lost. 2. If the first ground of objection is a good one, it serves to illustrate and strengthen the second. For the contract in that case must suppose, either that the judges are so ignorant of the laws as not to know them, or, knowing them, are wicked enough to decide against their knowledge. A proposition therefore which draws with it so odious and disgraceful a consequence, is in itself so shamefully indecent and disrespectful, that it ought not to be countenanced or upheld.

Lord *Mansfield*.—This case must be decided upon the state of it as it appears upon the declaration. It is there stated to be a wager made by the defendant who was the party appealing in a cause depending before the House of Lords; and who, in case the judgment was reversed in his favour, was to pay 50*l.* to the plaintiff; if it was affirmed, he was to receive 50*l.* He was willing therefore to receive something if he lost by the decision, and to pay the same sum if the judgment were in his favour: The chances therefore were equal.

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The question upon this state of it is, Whether this contract is against law, and void upon the face of it? 1774.

It is admitted by the counsel for the defendant, that the contract is against no positive law: It is admitted too, that there is no case to be found which says it is illegal: But it is argued, and rightly, that notwithstanding it is not prohibited by any positive law, nor adjudged illegal by any precedents, yet it may be decided to be so upon principles; and the law of *England* would be a strange science indeed if it were decided upon precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty. But the law of *England*, which is exclusive of positive law, enacted by statute, depends upon principles; and these principles run through all the cases according as the particular circumstances of each have been found to fall within the one or other of them.

The question then is, Whether this wager is against principles? If it be contrary to any, it must be contrary either to principles of *morality*; for the law of *England* prohibits every thing which is *contra bonos mores*; or, it must be against principles of *sound policy*; for many contracts which are not against morality, are still void as being against the maxims of sound policy.—With respect to the first question, Whether it is against morality? This contract is equal between the parties; they have each of them equal knowledge or equal ignorance: and it is concerning an event which, reasoning by the rules of *Predestination*, is to be sure so far certain, that it must be as it should afterwards happen to be. But it is a future event equally uncertain to the parties, whether the House of Lords would be of the same or of a different opinion with the Chancellor; the presumption, if any, rather against the person betting in opposition to the Chancellor's judgment.

No doubt there may be a wager of this kind under such circumstances as would render it immediately immoral, and change it into a crime; and of these there are some in the books; as in evasions of simony, where a person who wanted to be made a Bishop, conversing with the person who had most interest at Court upon the subject of a fee that was then vacant, said, "I will bet you so much, naming a considerable sum, that I have not the bishoprick." This was a mere colour to disguise what was the real intention of the party, which was, to purchase it. The contract in that case was clearly and manifestly corrupt, and therefore void. So if the present wager had been made with one of the Judges or with one of the Lords, it

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Contracts not prohibited by positive law, nor adjudged illegal by precedent, may nevertheless be void as against principles.

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would have been a bribe. Or if it had been as Mr. *Dunning* stated it, merely a colour to cover usury, then, notwithstanding the disguise of the wager, the moment the truth appeared it would remain to be governed by principles, as if the parties had really entered into such a corrupt agreement. Again, if it had been a wager laid with either the attorney or counsel in the cause, it would have been an objection. But there is no fact of that sort in this case; which is a transaction, that, as far as I can see, contains nothing either immoral or contrary to justice. As to the certainty of the law mentioned by Mr. *Dunning*, it would be very hard upon the profession, if the law was so certain, that every body knew it: the misfortune is that it is so uncertain, that it costs much money to know what it is, even in the last resort.

The second question is, Whether this contract is against sound policy? And supposing it clear of all the circumstances before-mentioned, such as its being upon equal terms, without fraud, and with a view only of securing something to the appellant, in case the decision went against him, I profess that, even independent of those circumstances, I see no objection to it in sound policy. From my own memory of this cause, if there ever was uncertainty in any case it was in this.

When a nice question therefore is depending, it may be a point upon which even persons in the profession may differ; and if either they or any two other persons bet about the decision, provided there be no fraud or colour in the case, I see no reason why they should not do so. The present case being of that sort, and not being prohibited by any positive law nor contrary to any principle of sound policy or morality, I do not think we are at liberty to prevent the plaintiff from bringing his action to recover the money he has won, and therefore I am of opinion that the rule for arresting the judgment ought to be discharged. The three other Judges concurred.

Tuesday,
April 26th.

STATHAM versus BELL.

Devise to a
son of which
the testator
supposed his
wife to be

THIS was a case out of Chancery upon the construction of a will; the substance of the facts stated was as follows: "That ——— *Statham* being seised in fee of the messuage at the time of making his will, when he should attain the age of 21 years, but if a daughter, then one moiety of his estate to his wife, and the other moiety to his two daughters (there being one alive at that time) when they should attain their ages of 21, with survivorship as between the daughters: if both die before 21, their moiety to go to the wife and her heirs for ever; if she died, her share to go to them. The wife proved not to have been *ensient*: the testator died, and so did the daughter without issue and under age. The wife shall take the whole estate.

" suages

“ suages in question, made his will, by which, among other
 “ things, he there says:—Whereas my wife is now pregnant,
 “ if she bring forth a son, I will that he shall inherit my estate
 “ at twenty-one years old; paying 4 *l.* a year to my wife and
 “ 30 *l.* a year to my daughter, at her coming to the age of twenty-
 “ one years, and 10 *l.* more to her on the death of my wife:
 “ but if it be a daughter, I give one moiety to my wife, and
 “ the other to my two daughters to be divided between them,
 “ and to be given them at the age of twenty-one years. If
 “ either die before that time, the survivor to have her sister’s
 “ share: if both die before that time, I give both their shares
 “ to my wife and her heirs for ever. If she die, then I give her
 “ share to my two daughters. The testator died leaving his
 “ widow and an only child, a daughter; the testator’s wife
 “ was not enſient at the time of making the will, nor at the
 “ time of the testator’s death. The daughter died under age,
 “ and without issue.—The question ſtated for the opinion of
 “ the court was, whether the wife took any, and what eſtate
 “ under this will, no child being born?”

1774.

STATHAM
versus
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Mr. *Kenyon* for the plaintiff.

The ſingle queſtion is, whether it was the intention of the
 teſtator, that in the event which has happened the wife ſhould
 take the whole eſtate? He inſiſted ſhe ſhould not, but upon
 the precedent condition expreſſed in the will, *viz.* the birth of
 a ſecond daughter, and the death of both without iſſue, which
 condition was not performed, and therefore ſhe could not be
 entitled. For if a ſon had been born, he was to take the whole
 eſtate, ſubject to the incumbrances charged upon it. If a
 daughter, one moiety only was to go to the wife, and the other
 moiety to the two daughters; and if both daughters died without
 iſſue, then the wife was to have the whole; therefore he did not
 intend that in *all* events the eſtate ſhould go to his wife; but only
 upon a *particular* contingency, which contingency has not hap-
 pened. *Comberbach* 437. *Eſcott* verſus *Warry*.—S. C. 2 *Eq.*
Caf. Abr. 361. under another name. “ Deviſe of a term to
 “ an infant in *ventre ſa mère*, if it ſhould be a ſon; and if it
 “ ſhould be a ſon and die under age, then to the teſtator’s grand-
 “ ſon. It proved a daughter, and it was adjudged upon ſpecial
 “ verdict, that the executrix, and not the grandſon, ſhould
 “ have the term; becauſe the grandſon was not to take, but upon
 “ a precedent contingency, *viz.* the birth of a ſon, which did not
 “ hap-

1774. "happen." So here the precedent condition, viz. the birth of a daughter, has not happened, and therefore the wife is not entitled.

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Again 2 *P. Williams* 390. *Davis v. Norton*. "Devise to *B.* in tail general, and if *B.* die without issue in the life-time of the testator's wife, then the wife to have the premises for life, remainder to *C.* in fee. *B.* dies without issue, but the testator's wife dies before *B.* Adjudged by *Reynolds* Justice, that the remainder limited to *C.* is a contingent remainder, depending upon the death of *B.* without issue in the life of the testator's wife; and as that contingency never happened, the remainder which depended thereon could never arise." So here, the limitation to the wife depended upon the birth of a daughter, and the death of such daughter without issue, but that contingency has not happened, and therefore the wife cannot be entitled.

Both the above cases are exactly in point. The case of *Jones* versus *Westcomb* may be cited against the plaintiff; but in that case there was an immediate bequest to the wife: here there were contingencies to arise first; neither of which have happened.

Mr. *Davenport* for the defendant *contra*.

Upon the natural construction of the words of this will, it was clearly the manifest intention of the testator not to lessen the benefit of the wife if she should prove not to have been ensient; but in case he should die leaving no son, or a daughter or daughters who should not survive his wife, or leave issue, then that his wife should take the whole estate. If so, in the event which has happened, she is clearly entitled notwithstanding the contingency, upon which the subsequent limitation was to arise, has not taken place. There are many cases where words full as conditional and contingent as the present have nevertheless been construed to be words of limitation. So was *Holcroft's* case, *Moore*, 486, 7. "Devise to the use of the first son of Sir *John Holcroft* in tail, and so to the second, third, and fourth sons successively. And if it fortune the said fourth son to die without issue, remainder over to *Hamlet Holcroft* with divers limitations over:" Sir *John Holcroft* never had but one son. The question was, whether the subsequent uses could arise? and it was held by the court that they could, for the words amount to no more than a limitation of the estate; and are not a condition precedent to the estate of *Hamlet*. *Jones*

versus Westcomb. Prec. Chan. 316. 3 Lev. 125. 2 Str. 1092; to the same point. And he observed there were repeated instances in which words of condition have been construed as limitations instead of contingencies; the latest in point of time is *White versus Barber, Easter term 1771*: there the devise was, to such child or children as the testator's wife should happen to be en-
sient with at the time of his death: The testator had only one son at the time of making his will; two were born after the will was made, and before his death; but his wife was not ensient at the time of his decease; yet the court held, "it
" was manifestly his intention to comprehend all the children
" which should be born of his then wife, whether before, or
" after his decease."—In the present case, the intention is ap-
parent, that if a son had been born, he was to take the estate, but in case of a daughter and general failure of issue before 21, the wife was to take the whole. In either event therefore the devise in the present case would take place; as an executory devise, if the contingency had happened, or as an immediate limitation upon the contingency which has failed.

1774.

STATHAM
versus
BELL.

The court took time to advise.

Afterwards, on the 16th of *May*, Lord *Mansfield*, having first stated the case at large, delivered the unanimous opinion of the court as follows:

" Our opinion is in these words: It was the plain intention
" of the testator, that in case no son should be born, and he
" should have no daughters who should live to the age of twenty-
" one years, that the wife should have the whole estate: and in
" the event which has happened she is so entitled."

His Lordship added, that the facts of this case differed from the famous case of *Jones versus Westcomb*. For here it was clear, that if the testator had died during the pregnancy of his wife, the estate would have descended to the heir at law in the mean time.

GOODTITLE ex dim. HART *versus* KNOT.

THIS was an ejectment brought to recover certain lands in the parish of *Alderschurch* in the county of *Lincoln*, to which the lessor of the plaintiff claimed to be entitled as

sonal estate, to trustees, for the payment of debts, legacies, and funeral expences, " *All the rest, re-
" fidue, and remainder of his real and personal estate to his wife, her heirs, executors and adminis-
" trators.*"—The personal estate is sufficient. The lands devised in aid, pass to the wife under the residuary clause. So if the personal estate had proved deficient in part only, the wife would have been entitled to the remainder.

Tuesday,
April 26th.

Devise of
particular
lands in aid
of the tes-
tator's per-

heir

1774.

GOOD-
TITLE
ex div.
HART
versus
KNOT.

heir at law of *James Humberton*: And on the trial a verdict was found for the plaintiff, for a moiety of the premises in question.

Upon a motion to set aside this verdict, it was ordered by consent of parties, that the verdict should be subject to the opinion of the court upon the following case:

"The testator *Humberton* being seised in fee of the premises in question, and of other lands, partly in possession, and partly in reversion, after the death of his wife; by his will, after several precedent devises and bequests, gave and devised as follows:" "In case my personal estate, exclusive of such part thereof as I have before given and bequeathed to my wife, shall not be sufficient to pay all my debts, legacies, and funeral expences; I hereby give to *Matthew Kenrick* and *William Reeve* and their heirs, all my lands and estates at *Alderchurch* in the county of *Lincolnshire*, UPON TRUST to sell and dispose of the same as soon as conveniently may be after my decease; and the money arising from such sale, I will and direct shall go, and be applied towards making good any deficiency as shall happen in my personal estate; and if after such sale the money arising thereby shall in any respect be deficient, I do then subject and make liable the reversion of my lands settled in jointure upon my wife to make good the same. The testator concludes thus: And lastly, all the *rest, residue*, and remainder of my real and personal estates whatsoever and wheresoever, I give, devise, and bequeath to my said dear and loving wife, her heirs, executors, and administrators; and I constitute her my sole *executrix*."

The testator died soon after, without altering his will, leaving the lessor of the plaintiff, and *William Blunt*, his heirs at law.—After his death the will was proved, and out of his *personal* estate all his *debts* and *legacies* were paid, and there was no occasion to call in the assistance of the real estate. The question was, "Whether the plaintiff as co-heir was entitled to recover the lands and estate at *Alderchurch*?"

Mr. Wilson for the plaintiff. The question depends upon, Whether the testator intended to comprise the premises in question in the residuary clause? He argued that the testator did not intend to comprise them, and if he did not, then the widow is not entitled, but they descend to the heir at law. He cited *Roe versus Flood*, *Fortescue* 184. and *Wright versus Hall*, there cited, and 1 *P. Will.* 302.

Mr.

Mr. *Cust* for the defendant. Upon the whole will there is no title in the heir at law: For the intention of the testator is clear, that his heir at law should not have the estate. In *Roe v. Flood* it was held, that the estate did not pass under the residuary clause, because it was a *lapsed devise*; and the court said, that residue must be expounded to mean rest and residue of the testator's lands undevise'd at the time of making his will, not, at the time of his death. But the question in this case is, whether lands devise'd upon a contingency which never happened, shall pass by this residuary clause? In support of which, he cited *Sprigg v. Sprigg*, 2 *Vern.* 394. devise of lands to executors to be sold, and thereout to pay 500 *l.* to *A.* if he return from beyond sea; the residue to *B.* *A.* died before the testator. *Per Lord Keeper*: The devise of 500 *l.* to *A.* if he be living, and shall return from beyond sea, is a contingent devise and on a condition precedent, which not happening, is as if never given. *Bethel v. Holmden* in *canc. Mich.* 1772. *Jones v. Westcombe* to the same point. But, he relied on the case of *Cliffe v. Gibbons*, 2 *Lord Raym.* 1324. as a case in point. There, *A.* by will directed all his debts and funeral expences to be paid as soon as conveniently could be after his death, and gave a power to his wife to sell, if need be, his lands, &c. for that purpose, and then to pay his legacies, amongst which he gave one of 1000 *l.* to his wife, and the residue of his estate after debts and legacies paid he gave to his wife. *Lord Cowper* was clearly of opinion that a fee passed by the devise of all the rest and residue to the wife after payment, &c.

1774.

GOOD-
TITLE
ex dim.
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versus
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Lord Mansfield after stating the case said, I think this an exceedingly plain case. There are two lights in which it may be considered: *First*, Whether in the event which has happened there is any devise at all of the premises in question? If there is not, they go by the residuary clause to the widow; for there are other estates devise'd; so that rest and residue is applicable to the other estates that are so devise'd: and I am of opinion that they certainly are not devise'd at all; for the testator says, "In case my personal estate shall not be sufficient, then I devise &c." He dies; his personal estate is more than sufficient; therefore he has devise'd nothing.

But *Secondly*, I will suppose the personal estate had been a little deficient, and that there had been occasion to make use of this devise to pay part of the debts, and that in consequence

1774.

GOOD-
TITLE
ex dim.
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of it they had been discharged. In the case I have put, the devise would have once taken effect, and there would have been a *resulting* trust for somebody, subject to the charge so brought upon it. The question would then be, whether in this case the heir at law could recover? One objection which has been taken is that the *legal* estate is in the *trustees*, and therefore the *heir* at law cannot recover in this ejectment. In answer to that objection it has often been determined that an estate in trust merely for the benefit of the *cestui que trust*, shall not be set up against him; any thing shall rather be presumed: nor shall a man defend himself by any estate which makes part of the title of the lessor of the plaintiff. Now if the trustees had paid this charge, they would then have become trustees for the persons entitled to the *surplus* after such payment. Therefore if the heir at law be that person, the objection being upon a ground which makes part of his title, it shall not be set up against him. The question therefore turns singly upon the construction of the will. Let us see then what the devise in the will is? It is a trust originally, and in substance a charge on land; which land is devised subject to raise by sale or mortgage as much money as is necessary for the payment of debts, legacies, and funeral expences. It is therefore in substance and equity a devise of a charge upon the estate; which may be discharged by payment of the incumbrance upon it: or, if not wanted, will rest in the same state as if it had not been made subject to such incumbrance. This brings it very near the case of *Cliffe v. Gibbons*, 2 Lord Raym. 1324-5. It is land before devised upon which a personal charge is let in; therefore the words, "All the rest of the land," necessarily make it come within the residuary clause. If it had been sold, after payment of what was wanted, the rest of the money arising from such sale of course must go to the person, to whom under the residuary clause the land was to go, subject to such payment and discharge. Therefore in either case the widow is entitled. The three other judges concurred.

Per Cur. Postea delivered to the defendant.

MEASE, Executrix, *versus* MEASE.

1774.

THIS was an action of debt upon bond conditioned for payment at a certain day. Plea, that it was given as an indemnity to the plaintiff's testator against another bond, and not damaged. Demurrer.

The Question was, Whether the agreement stated in the plea could be given in evidence against the express condition of the bond?

Mr. *Wilson* for the plaintiff. The plea is clearly bad, and the agreement cannot be given in evidence; it being settled that no parol evidence can be given to abate or extend a bond or deed. Lord *Bacon's Elem. Law, Regula* 23. p. 82. *Cro. Eliz.* 697. 1 *H.* 7. 16. 8 *Co.* 155. *Fitzg.* 73. 2 *Wils.* 347. *Meres v. Ansell*, reported since in 3 *Wils.* 275.

Mr. *Davenport* contra. The plea is founded in truth and fact.

Lord *Mansfield* interrupted him. If the fact is true, it is a proceeding by the plaintiff contrary to the agreement, and the court would incline to get at it in another form. I think therefore it would be better to make a motion to stay proceedings upon affidavit, and let it stand over; if upon motion the court should be against the defendant, he must pay costs, and judgment upon the demurrer shall be final. The plea is clearly bad.

After some assertions from the attorney for the plaintiff, Lord *Mansfield* said, let there be judgment for the plaintiff.

Tuesday,
April 26th.

Debt upon a bond, conditioned for payment at a certain day. Plea, that it was given as an indemnity to the plaintiff's testator against another bond, bad.

COLTON *versus* SMITH.

Wednesday,
April 27th.

THIS was an action for a toll for a wharf in *Gainsborough*.

One count in the declaration stated, that the plaintiff was lord of the manor, and that he and all those, &c. had immemorially used to keep and repair a wharf within the manor; and, in consideration thereof, had received toll of all goods landed within the manor; not confining it to the wharf. There was another count claiming a toll without stating any consideration at all. Verdict for the plaintiff.

Serjeant *Hill* had moved in arrest of judgment, because the consideration stated in the first count was insufficient in law; and a consideration

Prescription as lord of the manor for toll of all goods landed within the manor, in consideration of repairing a wharf within the manor, not confining it to the wharf, is good.

1744-

COLTON
versus
SMITH.

consideration being expressed, the court would not presume any other than the consideration so set forth.

Mr. *Wallace* now shewed cause. The case of *Crispe v. Bellwood*, 3 *Leo.* 424. is precisely this case. The plaintiff's ancestor there claimed the very toll in question, exactly upon the same ground of consideration, and the court then held it was a good one. Only two cases have occurred since. *Wilkes v. Kirby*, 2 *Lutw.* 1519. in which case there was no decision, but only a *quære* made by C. J. *Treby*: 2dly, *Trueman v. Walgham*, 2 *Wilf.* 293. which was clearly a case of toll thorough; and therefore distinguishable from the present toll, which being claimed upon all goods landed within the manor, in consideration of *repairing* a public wharf, is in the nature of a toll traverse, where no consideration in fact is necessary.

In toll tra-
verse no
considera-
tion is ne-
cessary.

Serjeant *Hill* agreed, that the case in 2 *Wilf.* 293. was a toll thorough, where a consideration was necessary to be laid; and admitted that in a toll traverse, as here, no consideration was necessary, because it is implied. But he insisted that as the plaintiff had thought fit to lay a consideration and to make it part of his prescription, the consideration, as laid, ought to be sufficient in law: but this was not; for no consideration is binding upon a third person unless he receive the benefit of it, and here every body who pays has not the benefit of it. As to the case in 3 *Leo.* 424. it is not this toll; and that case is no where reported, or even cited, but in 2 *Leo.* 96.

Lord C. J. *Treby* in *Lutwyche* makes a *quære* if such a consideration be good.

Lord MANSFIELD. In this case every body that pays has a benefit; for if they go to the wharf they have the benefit of it, and if they land their goods elsewhere within the manor, they land upon the plaintiff's private property. The *quære* made by Lord Ch. J. *Treby*, in *Lutwyche*, is rather against the defendant here; for it is, *quære* if not well alleged, and the plea good? Which shews he inclined to think it was. In the present case the landing is upon the plaintiff's private property, and in 3 *Leo.* 424. the court held the consideration good.

The three other judges concurred. *Per Cur.* Judgment for the plaintiff.

1774.

Friday,
April 29th.BURTENSCHAW *versus* GILBERT.

THIS was an action of trespass: Plea 1st. Not guilty: 2d. A justification under an authority from *Joseph Calverly* the surviving devisee of the lands in question, under a will made by *Nicholas Newenden* dated 7th August 1759, upon the validity of which will issue was taken.

One having made his will and a duplicate thereof, delivers the duplicate to A. afterwards he

makes another will, by which he revokes all former wills, and at the same time *cancels* that part of the former will which was in his own custody. Before his death he sends for an attorney to make a third will, but is senseless before he arrives. After his death, the first and second will are found together in a paper both cancelled; but the duplicate of the first is found uncanceled amongst his other deeds and papers. The act of cancelling the latter will does not set up the duplicate of the former.

The cause was tried at the last *Lent* assizes for *Suffex*, when a verdict was given for the plaintiff, subject to the opinion of the court upon a case stated, the substance of which was as follows:

That *Nicholas Newenden*, on the 7th of April 1759, duly made and executed his last will and testament, and at the same time executed a duplicate. At the time of making his will of 1759, he told one of the witnesses that the will was made in order to make his wife easy. Afterwards, he said it was not a will to his liking, and that he should alter it if he lived. *Nicholas's* wife died soon after: That the testator, upon the 7th of May 1761, fetched one part of the old will down stairs to have it altered, and then duly made another will of that date: In this will the devises were different from those in the will of 1759*. That *Nicholas*, after executing this latter will, took the said one part of the old will in his hands, tore off his name and seal, and directed Mr. *Sampson*, the person who had made the new will, to cut off the names of the witnesses to the old one; which he did in the testator's presence: and at the execution of this second will, he said, he made it in order to give *Mary English*, a devisee in the first, a greater portion; for otherwise Mrs. *Wesson*, another devisee in the first, would have more than her share. That he delivered this latter will to Mr. *Sampson*, who lived at about twenty miles distance, desiring him to carry it to his house and keep it; at the same time, he assigned as a reason for such request, that if his heir at law *Ann Newenden*, or his daughter *Wesson*,

* N. B. The bequests themselves made no question in the case; the only material circumstance was, that the devises in the latter will, varied from those in the former.

F774. should find it, they might destroy it. Said there was a duplicate of the will of 1759, in Mrs. *Weston's* custody; but would keep *this*, meaning his last will, as private as he could. Mrs. *Weston* lived about ten miles distant from the testator, but was in the house when the searches were made after his death. That *Anne Newenden* lived with the testator, and was about eighteen years' old when he died. That *Mary English* died in the life-time of the testator. That, sometime after her death, he sent to Mr. *Sampson* the following note—"Sir, I pray you to send me the will which you have of mine."—A second note was sent on the 14th of April 1762.—"Pray send me the will by the newsmen."—That, in consequence of this note, *Sampson* sent back the will of 1761 to the testator, who, before his death, sent to Mr. *Wheeler* an attorney, to come and make another will; who accordingly came in about an hour's time; but the testator had then lost the use of his senses, and died on the 28th of December 1762. That two searches were made in the testator's cabinet and boxes after his death, the keys of which were in *Anne Newenden's* possession; and one part of the will of 1759, and the will of 1761, were found together in a paper, both cancelled. The other part of the will of 1759 was found uncanceled in the testator's room, amongst other deeds and papers.

The question for the opinion of the court upon these facts, was, "Whether the testator died intestate or not; that is, Whether the will of 1759 was revoked?"

For the plaintiff, who claimed under the heir at law, it was insisted, that the will of 1759 was absolutely and completely revoked by the act of the testator in cancelling that part of it which was in his custody, notwithstanding the duplicate remained whole and uncanceled: And so it was held in Sir *Edward Seymour's* case, cited by Lord *Cowper*, in *Onions versus Tyrer*, 1 P. Wms. 346. 2 Vern. 743. Secondly, being a duplicate only of a will already cancelled, it cannot be set up again, but by an actual republication: For, since the statute of frauds, there can be no such thing as an implied republication. 2 Eq. Caf. Ab. 768-7. marginal notes: Com. Rep. 383-4. cited arg. in *Acherley versus Vernon*. 3 Bur. 1496. 1 Vez. 191. 1 Wils. 310. In the present case, not only no act of republication is stated, but no appearance of any intention in the testator to re-establish his first will, can be collected from the facts found: On the contrary it is manifest, that he was uniformly dissatisfied with the disposition he had there made, from the time he executed it to the hour of his death.

For,

For the defendant *contra*: That the will of 1759 was *not* 1774.
revoked. For the case states that the will of 1759 was a *sub-*
sisting will at the time of the testator's death, and in his own BURTEN-
possession at that time. It is found likewise, that the will of SHAW *versus*
1761 was cancelled. By that act therefore, the will of 1759 GILBERT.
is again set up, notwithstanding the clause in the will of 1761,
revoking all former wills. This doctrine is expressly laid down
in *Glazier versus Glazier*, since reported in 4 *Bur.* 2514.—
“Testator made two wills; both found to have been in his
custody at the time of his death.—The *second* was *cancelled*,
the *first*, *uncancelled*.—It was there argued, that the act of *making*
the *latter*, was a *revocation* of the *former*, and the *second* being
cancelled, the testator must be held to have died intestate. But,
per cur. “Such revocation is itself *revocable*, and being *can-*
celled by the testator, it has no effect; no operation at all:
“*The first will* therefore stands good.”

With regard to the question, whether the cancelling of one part
of a will is a cancelling of the duplicate, in some cases it may
be so held; as where the duplicate is in the possession of a per-
son whose interest it might be to keep it from the testator, or where
there is an actual withholding it from him, or where necessary
impediments lie in his way, and prevent his gaining the pos-
session of it.—But in the present case, it is expressly stated that
the uncancelled part was found among the testator's other deeds:
He had therefore full power to destroy or preserve it; and having
done the latter, with the knowledge of the second being can-
celled, it is strong evidence that he meant it should stand as his
last will.

The circumstance of the first will being cancelled, makes no
alteration, but it is equally revived by the second being can-
celled: and so it was held in *Onions versus Tyrer*. 1 *P. Wms.*
345. reported likewise in 2 *Vern.* 743. and *Pre. Chan.* 459.—
‘One made his will.—Afterwards he made a second will, by
which he revoked all former wills, and directed the first to be
cancelled, which was accordingly done: This latter will was
not duly attested to pass real estates. The question was, “*wh-*
“*ther* under these circumstances the testator did not die in-
“*testate?*” But the court held that the second will not being
duly attested, was a nullity, and did not revoke the former,
which therefore was good.’ The present however is a much
stronger case: For here there was a *deliberate cancelling* of the

1774. *second will by the testator himself: Not a mere legal defect in the instrument.*

BURTON-
SHAW *versus*
GILBERT.

Again, it is clear from the facts found in the special verdict, that the testator never intended to die *intestate*, which is *material*, as against the claim of an *heir* at law; and so was Lord Cowper's opinion in the case of *Onions versus Tyrer*, 1 P. Wms. 345. before cited; where he says, "tho' the first will was ordered by the testator to be cancelled, and the same was in fact cancelled, yet all this being upon a presumption that the latter will was good and duly executed, it is properly *relievable* under the head of accident." 1 P. Wms. 345.

It was suggested that the parties were willing to have a second argument, if the court entertained any doubt.

Lord Mansfield. I believe we none of us have the least particle of doubt in this case. I see no new light that can be thrown on the subject; there is no case in point; and the principles of law are clear enough. Since the statute of frauds, a will cannot be revoked, but by an instrument executed according to the solemnities required by that statute; or by burning, cancelling, tearing, or obliterating the same by the testator himself, or by his directions.

The mere
act of can-
celling a will
is no revo-
cation, unless
done *animo*
revocandi.

With respect to the *revocation* of a will by the act of *cancelling*, it is in itself an equivocal act; and, in order to make it a revocation, it must be shewn *quo animo* it was cancelled. For, unless that appears, it will be no revocation. As, if a man were to throw the ink upon his will, instead of the sand; tho' it might be a complete defacing of the instrument, it would be no cancelling; or suppose a man, having two wills of different dates by him, should direct the former to be cancelled; and through mistake the person should cancel the latter: such an act would be no revocation of the last will: or suppose a man, having a will consisting of two parts, throws one unintentionally into the fire where it is burnt; it would be no revocation of the devises contained in such part. It is the *intention*, therefore, that must govern in such cases; and that was the ground of the determination in the case of *Onions versus Tyrer*, 2 Vern. 743. upon the mention of which, in the argument, I thought that something remained, which was not stated. The whole question there turned upon the act of *cancelling*, being under a *mistake*. Indeed there was some doubt upon the evidence, whether the first will was cancelled at all: But Lord Cowper there says, supposing the first will had been cancelled, the testator did

did not mean to do so: Why? because the devises in the second will were precisely the same as those in the first, and to the same person. He did it therefore upon a supposition, that he had executed the latter according to the statute of frauds; not with a design to revoke the devises as to the real estate. It is clear, therefore, that the ground of the determination in that case, was, its being a *cancelling by mistake*; not that the first will was revived for want of the latter being duly subscribed by the witnesses. The books make Lord Cowper add (which would perhaps be difficult to maintain) "that even though the law held this to be a *revocation*, yet, under the head of *accident*, a court of equity would relieve." To be sure, in order to explain any such act of cancelling, tearing or defacing, &c. as I have before mentioned, parol evidence must be let in.

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 BURTON-
SHAWVERFUS
GILBERT.

But see how strong a case the present is, as to the testator's *intention* to revoke. At the very time of making his first will, he expresses his dissatisfaction at it; and adds, that he meant to alter it if he should survive his wife, because Mrs. Weston would take more under it than he intended she should do. He persists in the same intention after the death of his wife, and executes it by a new will in 1761, which is a complete, legal, and effectual will; and if he had died immediately after, whether he had cancelled the former, or not, it would have been revoked; because at the end of the second will, there is a declaration by which he revokes all former wills. Besides this, he deliberately cancels that part of the will of 1759 which he had in his own possession; and by the evidence it is clear, that he had not the duplicate in his possession at that time; for he mentions that it was in the hands of Mrs. Weston; and the reason appears, why he could not well get at it, from the circumstance that induced him to give Mr. Sampson the care of the second will: namely, that if Ann Newenden or Mrs. Weston should get at it they might destroy it.

The facts are too many and too strong to admit of a question, but that, at the time of making the second will, the first was upon every principle of law clearly revoked, and can never be set up again but by a new will. It is however contended, that there are circumstances which are equivalent in this case to a new will; and they are these: that Mary English, a favourite devisee under the will of 1761, died: By her death his intentions under that will were defeated; and being so, he had cancelled it. Further, that he had it in view to make a new will, and there-

1774. fore, there is the strongest evidence of his intention not to die intestate; but he is speechless before he can accomplish it. Be it so: but he had actually cancelled the will of 1759. Why then is the disposition in that to be set up in preference to any other, or even to that made under the will of 1761? It does not appear *when* he cancelled the will of 1761, but he did it so leisurely, that he put it up together with the will of 1759; and the reason, as it appears, for his doing so, was, because he meant to make another will. It seems however upon search that the other part of the will of 1759 had come from Mrs. *Weston's*, and was found amongst the testator's papers. How did it come there? With what view? Upon what message? Under what circumstances? Whether the testator sent for it, or not, we are all in the dark. The jury it is true have not found that it was put there after his death, but they have not found how it came there, nor was any thing suggested about it at the trial. It being therefore in the possession of the testator, nobody knows how or why, there is no colour for its being set up after the former part was cancelled. It is a very strong, and a very plain case.

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SHAW *versus*
GILBERT.

Where there are duplicates of a will, one in the custody of the testator, the other not; and the testator cancels

Asson Justice. If the duplicate of the will of 1759 had still remained in the hands of the person to whose custody it was originally entrusted, yet the cancelling that part which the testator had in his own possession would have been a sufficient cancelling of such duplicate.

that which is in *his* custody, it is an effectual cancelling of both.

Mr. Justice *Willes*, and Mr. Justice *Abbott* concurred, *Per Cur.* Let the *posse* be delivered to the plaintiff.

Tuesday,
May 3d.

Trespass on the case lies by a master for seducing his journeyman.

HART *versus* ALDRIDGE.

THIS came before the court on a case reserved upon the following question; Whether under the circumstances of this case the plaintiff was entitled to recover?—It was an action of trespass on the case for enticing away several of the plaintiff's *servants* who used to work for him in the capacity of journeymen shoemakers. The jury found that *Martin* and *Clayton* were employed as journeymen shoemakers by the plaintiff, but for no determinate time but only by the piece, and had at the time of the trespass laid each of them a pair of shoes unfinished; that the defendant persuaded them to enter into his service and to leave these shoes unfinished, which they accordingly did.

Mr.

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Mr. *Darell*, for the plaintiff, stated it to be a question of common law, and that the only point for the opinion of the court was, "Whether a journeyman was such a servant as the law takes notice of?" In support of which proposition he insisted that a journeyman is as much a servant as any other person who works for hire or wages; that neither in reason nor at common law is there any distinction between a servant in one capacity or another, and that the injury of seduction is in all cases the same, though the recompence in damages may be different. To shew that an action lay at common law for taking a servant out of his master's service, he cited *Broke Abr. tit. Action sur le casé, pl. 38. 11 Hen. 4. 23. pl. 46.* In *Fitzherbert*, 168. D. it is laid down, that "if a man take an infant or other out of another's service, he shall be punished, although the infant or other were not retained." In *Brooke, tit. Lab. p. 21.* a distinction is taken between the taking a servant out of his master's service, and the procuring him to depart or retaining him after a voluntary departure, being apprised of his first retainer: In the two last of which cases, an action on the case is the proper remedy; in the former, trespass, at common law. But he insisted that in no case had there ever been a distinction taken with respect to the time for which a servant might be hired; nor indeed before the stat. 5 *Eliz. c. 4.* was any precise time necessary; the object of which statute was very different from the question before the court. He pressed the argument *ab inconvenienti*, stating that it would be of great detriment to the town, where the whole trade was in a great measure carried on by this sort of servant.—That the verdict had found the defendant to be apprised of the retainer of the servants, it being in proof that he had desired them to leave their work then in hand unfinished.

Mr. *Willes contra.* The single question is, Whether the enticing away a journeyman shoemaker, who is hired to make a single pair of shoes, is such an injury to his master as that an action will lie for it? Now the jury have found that there was no hiring for any determinate time, but only by the piece: If so, they could not be the plaintiff's servants; for the term 'journeyman' does not import that they belong to any particular master.

Lord *Mansfield* interrupted him. The question is, Whether saying that such a one is a man's journeyman, is as much as to say, that he is such a man's servant; that is, whether the jury by finding him to be the plaintiff's journeyman do not *ex vi termini* find him to be his servant? A journeyman is a ser-

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vant by the day; and it makes no difference whether the work is done by the day or by the piece. He was certainly retained to finish the work he had undertaken, and the defendant knowingly enticed him to leave it unfinished.

What is the gist of the action? That the defendant has enticed a man away who stood in the relation of servant to the plaintiff, and by whom he was to be benefited. I think the point turns upon the jury finding that the persons enticed away were employed by the plaintiff as *his* journeymen. It might perhaps have been different if the men had taken work for every body, and after the plaintiff had employed them the defendant had applied to them, and they had given the preference to him in point of time. For if a man lived in his own house and took in work for different people, it would be a strong ground to say that he was not the journeyman of any particular master: But the gist of the present action is, that they were attached to this particular master.

Ashton Justice. It is clear that a master may maintain an action against any one for taking and enticing away his servant upon the ground of the interest which he has in his service and labour. And even supposing, as my Lord has stated, that the servant did live in his own house, if he were employed to finish a certain number of shoes for a particular person by a fixed time, and a third person enticed him away, I think an action would lie. If not, it might be of very bad consequence in trade. He is a servant *quoad hoc*, and though the seducer and enticer is much the worse, yet the law inflicts a penalty upon workmen leaving their work undone.

Mr. Justice *Willes* and Mr. Justice *Asbhurst* concurred. *Per Cur.* Let the *postea* be delivered to the plaintiff.

Tuesday,
May 3d.HOWLET and another *versus* STRICKLAND.

In cove-
nant, unli-
quidated
damages a-
rising from
the breach
of other co-
venants to
be perform-
ed by the
plaintiff,
cannot be
pleaded by
way of set-
off.

THIS was an action of covenant. The defendant pleaded that he had sustained greater damages by reason of the breaches committed on the part of the plaintiff, than the value of the damages sustained by the plaintiff on account of the breaches alleged in the declaration: all the breaches assigned in the plea were for non-delivery of allum in due time. The plaintiff demurred, and for special cause assigned, that it was not competent to the defendant to plead these damages by way of set-off.

Mr.

Mr. *Chambre* for the plaintiff. The covenant is not for money, therefore the damages cannot be set off, either by *stat. 2 G. 2. c. 22.* or *8 G. 2. c. 24.* For they are not debts, nor recoverable as such. A tender is only pleadable to an action of contract for money.

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 versus
 STRICK-
 LAND.

In no part of the plea is it alleged, that these are mutual debts. But farther in this case, the damages to be recovered upon the covenant, are totally uncertain; the measure of them depending upon the discretion of the jury. It is impossible therefore for the parties to affix any precise balance; and consequently the act of parliament cannot extend to them. If the construction which is contended for on the other side, is to prevail, damages upon a breach of marriage contract, might be insisted upon as debts: and the same reasoning might extend to the setting off damages in an action of trover.

Mr. Serjeant *Walker* for the defendant. By *stat. 2 G. 2. c. 22.* a defendant is at liberty to set off any demand that he may have against the plaintiff; or to plead it in bar as the nature of the case may require, and by *stat. 8 G. 2. c. 24.* this power is extended to debts of a different nature.

The present action is an action for damages, and the set-off is of the same nature as the demand; *viz.* unliquidated damages: the verdict therefore will decide the balance. The uncertainty of the damages cannot be a foundation for the distinction insisted on: for the words of the statute are general, "mutual debts:" and in almost all the cases where a set-off is allowed, the balance is uncertain. In an action upon a *quantum meruit*, the very expression shews, that the damages are unliquidated: so in an action for work or labour done, or for goods sold and delivered, the damages are unliquidated. No inconvenience can arise in the present case, because these damages arise upon the same instrument, and make but one transaction: the jury therefore can decide with equal ease upon both.

Lord *Mansfield*. I take this plea to be merely for the purpose of delay. The act of parliament, and the reason of the thing, relate to mutual debts only. These damages are no debts. An *indebitatus assumpsit* could not be brought for them.

Mr. Justice *Ashurst*. Debts to be set off must be such as an *indebitatus assumpsit* will lie for.

Mr. Justice *Aston*. Clearly an unliquidated demand or uncertain damages cannot be set off. Mr. Justice *Willes* concurred.

Judgment for the plaintiff.

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Thursday,
May 5th.REX *versus* SIR JOHN CARTER.

Information in the nature of a *quo warranto* granted, where the right depends upon a matter of doubtful law, in order to its being finally determined. The question in this case, was, whether an infant of nine years old was capable of being elected a burges?

UPON a rule to shew cause why an information, in the nature of a *quo warranto*, should not be directed to the defendant, to shew by what authority he claimed to be a burges of the borough of *Portsmouth*, the ground of the application was, that at the time of his being elected a burges he was an infant of the age of nine years only; and therefore incapable of serving the office: and the case of *Rex versus White, cases temp. Lord Hardwicke* 8. was cited. But here it appeared that the defendant was not sworn in nor ever acted till after he was of age.

Upon shewing cause, the counsel against the rule went very much at large into the doctrine of an infant's capacity to take. But as the court were clearly of opinion that they ought not to decide so material a question in this summary mode, I shall postpone stating the arguments on this head, till the decision of this question upon demurrer, *Mich. 15 Geo. 3. infra*, 220. when they were repeated.

Secondly, they pressed the ground of long acquiescence; stating that the defendant was elected a burges in 1751, sworn a burges in 1763; an alderman in *September* 1763: afterwards elected mayor, and no objection made, till the present time, when the attempt is to disfranchise him, and sixty other persons claiming under his election. As to eleven of them it was contended there could be no question; because the mayor, and all the aldermen who were within summons were present, and all concurred in their election. Amongst them was Mr. *Barlow* the late mayor. If therefore the mayor chosen under *Carter* was not legal mayor, *Barlow*, agreeable to the terms of the charter, must be considered as legal mayor; because the charter directs that the mayor must hold over until another be duly chosen.

Lord *Mansfield* stopped the counsel on the other side, as being unnecessary to say any thing.—The only question now before the court is, whether the rule shall be made absolute, that is, whether the cause shall go to trial.

The only point which struck me as material to be considered, was the second ground of objection to the rule; namely, the circumstances under which this application is made; from which it

it appears, that if the admission and election had been at the same time, the defendant would have been in possession above twenty years. But it is said, though a title accrues within twenty years, the court, under circumstances, will not interpose to disturb the peace of the corporation. In cases where there has been a long acquiescence, and where the objection, if it prevailed, might go to dissolve the corporation, the court might be so disinclined. But here there is no acquiescence for any considerable period of time; and it is admitted on all hands that it will not endanger the dissolution of the corporation.

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 versus
 CARTER.

The objection then turns singly upon a point of doubtful law; whether an infant is capable of being elected a burges. This may be a very considerable question, and a great deal may be said in favour of their being elected. An infant is capable of purchases and privileges that are for his benefit, and amongst other privileges that of a grant. Suppose the king in the first charter had nominated an infant one of the burgesses: Upon a question whether the nomination was void, it would depend upon circumstances; and might turn upon the nature of the acts requisite to be done by the burgesses. It may be a question which in its consequences may more or less affect the right of all the corporations in the kingdom. Therefore all these grounds operate conclusively to make the rule absolute. The reasons urged against it are, that there is no precedent which supports the application. But two cases have been cited, in which the reason Lord *Hardwicke* assigns for sending the very question now under litigation to be tried, was, that it had never been settled. It does not appear that those cases ever were finally decided. Therefore the court in this case adopt the reason which weighed with Lord *Hardwicke*, and make the rule absolute, that the question may receive a full and final determination. As to the election of the eleven being good, upon the ground that if *Carter* was not mayor, *Barlow* was; where a man has no idea that he is acting in a particular capacity, it is the same thing as if he was absent: no authority has been cited to shew that such an election would be good; and we cannot in this summary way determine that it is. Therefore it is most clear that all the rules must be made absolute.

The three other Judges concurred.

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Saturday,
May 7th.REX *versus* ABRAHAM HALL.

The costs to
be paid by
offenders
under stat.
6 G. 1. c. 48.
sect. 1. must
be ascertain-
ed by the
conviction,
or it is bad.

THE defendant upon a motion to discharge him out of prison, being brought up by *habeas corpus*, and the warrant of commitment returned, it recited, that, "Whereas the defendant was, upon the complaint of *Edward Ripley*, boatwright, and upon the oath of, &c. convicted before me *John Drage* Esq; one of his majesty's justices of the peace, &c. in pursuance of an act of parliament passed in the sixth year of the reign of his present majesty, for cutting down and carrying away one ash timber-tree, that was growing in a drove-way belonging to an enclosed ground, called a dolver, at *Burwell* aforesaid, in the county aforesaid, the property of *Matthew Deace* of *Burwell* aforesaid, gent. without the consent of the said *Matthew Deace* the owner thereof. And this being for the first offence, the said *Abraham Hall* was ordered by me, the said justice, to forfeit and pay down the sum of fifteen pounds, together with the charges previous to and attending such conviction: which he refused to pay. These are, therefore, in his majesty's name, to require you the said constable, to convey and deliver into the custody of the said keeper of the said common goal, the body of the said *Abraham Hall*: and you, the said keeper, are hereby required to receive the said *Abraham Hall* into your custody in the said goal, and him there safely to keep during the time of nine months, or until the said forfeiture or sum of fifteen pounds, together with the charges previous to and attending the said conviction, shall be paid, And hereof fail not."

Given under my hand and seal, &c. *John Drage*. And this is the cause of taking and detaining the said *Abraham Hall*, &c.

Mr. *Bearcroft* objected to this commitment as illegal. For though the statute is in the alternative "that upon non-payment of the penalty and costs, the offender shall be committed to gaol for any time not exceeding twelve months, nor less than six, or until the penalty and charges shall be paid, yet this conviction does not ascertain any sum for costs or charges: the time of imprisonment therefore is uncertain, which is fatal."

Lord

Lord *Mansfield*. This conviction cannot be supported. The principal judgment is a penalty in a certain sum of money, and imprisonment is a coercion of the payment: but while the sum remains uncertain the defendant cannot be released. Therefore, let the conviction be quashed, and the defendant discharged. The three other judges concurred.

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LOVAT *versus* PARSONS and others, assignees of Allen.

Saturday,
May 7th.

IN *Trover* for a cask of indigo, upon a rule to shew cause why a new trial should not be granted; the facts, as they appeared upon the report of Mr. Justice *Aspburgh*, were as follows:

That one *Allen*, previous to his becoming insolvent, had ordered a small cask of indigo of the plaintiff; who, in consequence of such order, sent him a cask containing about 2 *cwt.* by the waggon. *Allen*, upon receiving notice from the plaintiff of the indigo being upon the road, sent a letter, complaining that the quantity was more than he could take. The answer to which was, that his order had been complied with, and that the plaintiff never sent less, and would expect to be paid for it within four months. *Allen* still objected to the quantity of the indigo, and also to the time of credit; but in a subsequent letter all objections were removed, by the offer of one *Smith* to take all the indigo of the plaintiff at a certain price, to which the plaintiff consented. Subsequent to this, and after the arrival of the indigo in the waggon, *Allen* made an assignment of all his effects for the benefit of his creditors, but refused to assign the indigo, saying it would injure the plaintiff. The question was, "Whether under these circumstances the indigo was the property of *Allen* or of the plaintiff?" The jury found a verdict for the plaintiff, damages 111 *l.*

Serjeant *Davy*, in support of the rule, insisted, that the indigo having been sent to *Allen*, in pursuance of his order for that purpose, was become his actual property; and therefore, upon his insolvency, ought, as well as his other effects, to be equally divided amongst his creditors. For, though a seller who has delivered goods to a carrier by order of the vendee, may in case of an insolvency stop them *in transitu*, yet if they are delivered to the vendee, as in point of fact this indigo was, the property is effectually altered. If *Allen* had not become insolvent, he

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would have been liable to the plaintiff in an action for goods sold and delivered. If so, he is a debtor for them; and this being an assignment for the benefit of all his creditors, he would have no right to give a preference to the person selling the indigo; consequently the vendor cannot claim such preference.

Lord *Mansfield* inquired, whether the indigo, after arrival, remained in the hands of the carrier till the dispute between the plaintiff and *Allen* was settled? Upon its being answered in the affirmative, and that the assignees, the day after the assignment, had prevailed on the carrier to deliver the goods to them; Lord *Mansfield* said, I think it was a great indulgence in the judge to give you leave to move for a new trial without costs. This is a dispute about a parcel of indigo; and *Allen*, the person to whom it was originally sent, refuses to take it, because the quantity is too great: he next objects to the shortness of the credit given; and finds fault both with the quality and the price. But at last he sends word to the vendor, that he has met with a person who will purchase the indigo of the plaintiff in his stead, at a certain price; to which price the vendor in answer agrees. Subsequent to this, the defendants apply to *Allen* for an assignment of his effects for the benefit of all his creditors; and being apprised of the dispute relative to the indigo, request him to assign that amongst his other effects. This *Allen* positively refuses to do, saying, he would sooner rob on the highway, for that he had never accepted it. After this declaration, the assignees, with full notice that it was not *Allen's* property, bribe the carrier to deliver the indigo to them, and now insist they are entitled to it, as claiming under *Allen*, though he has renounced all claim or right to it whatsoever. I really never saw a case so void of pretence or law; and am extremely sorry that leave was given to make the motion without costs.—The three other judges concurred.—Rule discharged.

Monday,
May 9th.GRIFFIN *versus* BLANDFORD.

Custom ill
set forth,
for want of
stating the
particular
exceptions
to it.

IN Replevin, the defendant avowed the taking under an ancient custom, that time out of mind, the Lord of the manor, upon the death and alienation of every tenant, was entitled to the second best beast; if but one, then to that one beast; and if no beast, then to a compensation in lieu thereof.

Upon

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FORD.

Upon the evidence, the custom appeared, by a decree of the Duchy of *Lancaster*, to be, that time out of mind the Lord of the manor, upon the death of every tenant dying seized, and upon the alienation of all and every parcel of the said lands, &c. had been used to have, and of right ought to have, the second best beast, only one and no more; if but one beast, then that one; if no beast, then so much money as the chief rent amounted to; with an *exception* of mesne feignories, burgage tenures, and alienations to the use of the alienees and their heirs. Verdict for the plaintiff.

Upon a rule to shew cause, why a new trial should not be granted, it was objected, that the custom, as set forth in the consufance, was different from the custom proved; no exception being stated: and if there had, it might have appeared that this was a case within it.

Lord *Mansfield*. I am satisfied that, in point of form, the custom is not set out as proved; for there is nothing in the plea, which goes to shew that burgage tenures and mesne feignories are excluded, therefore the objection must prevail. But there is nothing upon the merits.

Per Cur. Let there be a new trial, with liberty to the defendant to move to amend his plea.

BLATCH *versus* ARCHER.

Same day.

UPON shewing cause, why a new trial should not be granted, in this case, Mr. Justice *Willes* read his report as follows: —“ This was an action of debt against the sheriff of *Essex*, for an escape of one *Moody*. The declaration stated a judgment of this court in debt, an arrest, and a subsequent escape. At the trial, a question arose, whether the arrest was legal? It was objected, First, that there was no proof of a *ca. sa.* being delivered to the sheriff. But I held, the return of *non est inventus* indorsed upon the writ sufficient in this action. Secondly, That the arrest, if any, was by the son of the bailiff, and not by the bailiff himself, who was at the distance of thirty rods, and not *in sight*, therefore no legal arrest. But I left it to the jury to say, whether old *Fenton*, the officer, was not *quodam modo* present at the time of the arrest; the jury found that he was, and gave a verdict for the plaintiff.”—Upon the motion and now, a third ground of objection was made, namely, that no warrant was produced: but

In debt for an escape against the sheriff, the indorsement of *non est inventus* upon the *ca. sa.* is sufficient evidence of its being delivered to the sheriff.

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but Mr. Justice *Willes* said, he did not recollect that objection being mentioned at the trial.

Serjeant *Kempe* and Mr. *Lucas* shewed cause. First, The question, whether old *Fenton* the officer was or was not present at the time of the arrest, was a fact proper to be left to the jury. For it is nowhere laid down that the actual taking must be by the bailiff himself; it is sufficient if it be by the assistant, and the bailiff be near at hand. In 6 *Mod.* 211. which is the only case upon the subject, there was no determination. Secondly, It is not necessary in an action against the sheriff to prove that the *ca. sa.* was delivered to him.

Mr. *Morgan* said, his objection was that the *warrant* was not produced.

Answer. The warrant is in the hands of the officer, and therefore it is not in the power of the plaintiff to produce it: nor is it necessary in this action where the sheriff is charged *civilly*. Otherwise, in an action of false imprisonment; for there a clear and regular authority must be shewn in every particular, or he is not chargeable; but here his own irregularity ought not to be an excuse for his neglect. Besides, the sheriff's agent, one *Thomlinson*, who was called and could have proved it, immediately, upon hearing his name, ran out of court to avoid his being examined.

Mr. *Wallace*, Mr. *Cox*, and Mr. *Morgan* in support of the rule.

The fact to be proved in this case is, that the party was legally arrested: To establish which it must be shewn, either that the arrest was by the sheriff himself, or by virtue of a warrant in the hands of an officer, duly signed and sealed by the sheriff: for, an arrest under a *verbal* authority would be illegal; and the party arrested would be entitled to his discharge. It would be strange in such case to charge the sheriff as for an escape under a *legal* arrest. It was necessary therefore to shew that *Fenton* the officer had an authority; with regard to which there is no evidence; for the writ and the return only shew that the sheriff had a writ: and it was in their power to have proved it; for they might have subpœnaed *Fenton*, and given him notice to produce the warrant. But secondly, suppose the warrant had been proved, this is no legal arrest. For the warrant was given to the officer; and the arrest was by his son, at the distance of thirty rods, which are two hundred yards, not even in sight of the father, much less in his presence which is necessary.

Mr.

Mr. *Morgan* objected strongly that the warrant * was demanded by *Moody* the person arrested, and not shewn; therefore the arrest was bad; and cited 6 Co. 54. The countess of *Rutland's* case.

Lord *Mansfield*. This is rather a hard action; and certainly, in a case attended with hardship, juries have a leaning as far as justice will permit them, and so has the court. But still I am not satisfied to say, that the verdict in this case is wrong.

Several objections have been made; 1st. That the arrest was not by the sheriff's officer himself, for that the father was the officer, and the son the hand that arrested. That the officer must be the authority to arrest, is certain: but he need not be the hand that arrests, nor in the presence of the person arrested, nor actually in sight, nor is any exact distance prescribed. As to the bailiff being the authority in this case, it is in proof that *old Fenton* came to *Ingatesone* to arrest *Moody*, and went out of the public house for that purpose. It is true one of the witnesses speaks to his being at the distance of thirty rods; but he does not speak at the time of the arrest; nor is it easy to speak with certainty, as to distance at a particular time. But it is said, that *young Fenton* the son, who could have cleared up the doubt, ought to have been subpoenaed by the plaintiff. It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted. But I think it would have been very improper to have called the son; for in fact it is an action against his father the bailiff, though nominally against the sheriff. Upon the whole therefore I am of opinion, that the fact was fairly and properly left to the jury; it was their province to judge, whether the officer was on that business; and if he was immediately following the son, it is sufficient. It would have been a different case if he had been upon some other errand, or had staid at home, and sent a third person to make the arrest.

As to the other objections, it is clear, that *old Fenton* was the officer who was to arrest: and being so, his name, according to the usual practice, is indorsed on the writ. Lastly, the return of *non est inventus* on the back of the writ is sufficient evidence against the sheriff of the delivery of the *ca. sa.* for it is an acknowledgment of it under his own hand. Therefore I am of opinion there is not sufficient ground for granting a new trial.

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An arrest must be by the authority of the bailiff; but he need not be the hand that arrests, nor in the presence, nor actually in sight, nor within any precise distance, of the person arrested.

* The evidence was, that *young Fenton* said at the time of the arrest, that he had his authority in his pocket, and that it was at the suit of Mr. *Blatch*. The name of *old Fenton* was indorsed upon the writ.

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Aston Justice. It is not necessary that the bailiff should be actually in sight, but he must be so near, as to be near at hand, and acting in the arrest; and the jury in this case have found that he was.

With respect to the delivery of the *ca. sa.* it is evident it must have been delivered from the return of *non est inventus* indorsed upon the back of it. But it is further objected, that there should have been a *mandate* to the officer, who was to take the body. Here *Fenton* was the person appointed; and his name appears upon the back of the writ, which it seems is the usual ceremony of authorizing the bailiff to arrest. But a material fact in this part of the case is, that the sheriff's agent, one *Thomlinson*, whose business it was to make out the warrants, and who could have proved the fact, upon being called, ran out of court to avoid being examined. Therefore I am of opinion, upon all the objections, that the rule ought to be discharged.

Asbhurst Justice. I am of the same opinion. The jury have found that the officer was so near as to be acting in the arrest; which is sufficient: he need not be actually in sight. 2dly. It may be very difficult for a plaintiff to be able to prove the existence of a *warrant*, which is in the custody of the officer, and necessary to be so, as his own justification. Therefore very slight evidence is sufficient to shew that there was a warrant, and here the bailiff's name is indorsed on the writ; which is the usual method.

Per cur: Let the rule be discharged.

Tuesday,
May 10th.

WHITBREAD versus BROOKSBANK.

The price
of barley at
the port is
the rule of
the bounty
upon the
exportation

THIS was an action on the case, for money had and received by the defendant, an officer of the excise, to the use of the plaintiff. The jury found a special verdict in substance as follows:

of strong beer, and not the average price of barley throughout the kingdom.

"That the plaintiff, after the 24th of January 1761, brewed from malted corn, and duly exported from the port of London, 6229 barrels of beer as merchandize at different times from the 6th of June 1771, to the 15th of September 1772, when barley was at and under the price of 24s. per quarter at the said port of London, and above the said price of 24s. per quarter, according to the average price of corn throughout the kingdom at large, as

published

published in the Gazette, according to stat 10 Geo. 3. c. 39. for *registering the prices of corn* in the several counties of Great Britain; upon which 6229 barrels of beer, the duties were charged and paid: and the said plaintiff claimed to be allowed, by the commissioners of excise, and the said *Stamp Brooksbank*, their proper officer in this behalf, the bounty of one shilling a barrel, amounting to 31*l.* 9*s.* 9*d.* by virtue of the stat. 1 Geo. 3. c. 7. f. 6. which directs such bounty to be allowed on beer exported, when barley is at or under the price of 24*s.* per quarter, and which bounty, the said commissioners and the said *Stamp Brooksbank* had refused to allow: and that it was the *usage* of the commissioners of excise to allow such bounty on beer exported from the port of *London*, when the price of barley was 24*s.* per quarter, or under, at the port of *London*." The question upon this special verdict was; "Whether the bounty was to be regulated according to the *average price* of barley throughout the kingdom, or according to the price at the port of *London*, from whence the beer was exported?"

Mr. *Davenport* for the plaintiff. The first act of parliament relative to the subject-matter in dispute is 1 *W. and M. c. 12.* which gave a bounty on the exportation of corn. The act on which the present question immediately arises, is 1 Geo. 3. c. 7. *sect.* 6. which, reciting the stat. 1 *W. and M. c. 12.* and the bounty there given on corn, grants a bounty on the exportation of beer made from malted corn, as a further encouragement to agriculture. The stat. 13 Geo. 3. c. 43. which is the last act upon the subject, repeals all the former bounties, and grants others in lieu thereof, *to be paid and allowed* by the same rules and regulations as the former bounties were paid and allowed, &c. By comparison of all these acts, it appears, that the rule of the bounty must be taken from the price of barley at the port or place of exportation. For though the stat. 1 Geo. 3. c. 7. is silent on that head, yet it certainly had a reference to the stat. 1 *W. and M. c. 12.* and it is found by the special verdict, that the usage always has been to allow the bounty according to the price at the port of *London*. The question then is, whether the *register* act stat. 10 Geo. 3. c. 39. has made any alteration, or varied the rule in any respect? and it clearly has not, for it fixes no bounty, it regulates no price, it has no reference at all to the subject-matter. Further it appears from a comparison of the two acts, that the register act had

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1774. quite a different object in view, namely, to enable the legislature to fix some permanent rule and price for the general exportation and importation of corn, &c. and this is the more apparent from the statute made the next sessions 11 G. 3. c. 1. to prohibit the exportation. Then followed the stat. 13 Geo. 3. c. 43. which, after reciting and taking into consideration all the old rules, enacts, that whenever the different sorts of grain, &c. there specified shall bear such a price at the port or place, &c. all duties upon importation are to cease, and a less duty shall be paid; and when they bear such a price the particular bounties upon exportation there mentioned are to commence; *which bounties are to be paid and allowed by the same rules and regulations as the former bounties on corn or grain, and in as full and ample a manner as if the clauses in such former acts were repeated.* From these several acts it appears, that as the prices of grain have varied in different parts of the kingdom, the rule which the legislature has pursued, in respect of the price, has been in some measure regulated by the relative scarcity of the commodity itself at each particular port. But as there has been no difference in the rule respecting the bounty from the 1st W. and M. c. 12. to the 1st Geo. 3. c. 7. and the stat. 13 Geo. 3. c. 43. certainly making none, the plaintiff in this case is clearly entitled to it.

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Mr. Serjeant *Walker* for the defendant. The bounty must be taken from the national average price throughout the kingdom. Before the stat. 10 Geo. 3. c. 39. no doubt the rule of the bounty was according to the price of each respective place of exportation; but the legislature saw the inconvenience of regulating the bounty by the price at a particular port, when the general price throughout the kingdom might be different. And therefore provided by this act, that an average price should be ascertained: And wisely; otherwise the most alarming consequences might ensue. The nation at large might be in want of corn, when, at a particular port, the price either by design or accident had been raised; and the general scarcity would be increased at the additional expence of a bounty to the very person increasing it, namely, the exporter. The medium price of all the markets in *England* ought to be the price, and is the right one.

Lord *Mansfield*. My principal doubt is, how this came to be made a question; because I do not see the ground upon which the excise have varied the former usage. The act of W. and M. refers to the price at the port, and the usage under it has been uniformly so. Then follows the stat. 1 Geo. 3. c. 7. which gives a
bounty

bounty upon the exportation of beer, to be governed by the price of barley; and the jury find, that the rule, by which the excise has governed itself in the allowance of this bounty, has been, by the price of barley at the port. This rule has continued to the 10 Geo. 3. c. 39. which was made for quite a different purpose, whether politically or not is a great doubt: but the view was to guide the judgment of the legislature in ascertaining the quantity of corn and grain, exported and imported, in order to fix a rule by which the price of corn might be known in all parts, and consequently to render it capable of having an average price fixed: but it does not refer or apply to any of the former acts, or make mention of them. *Lastly*, the stat. 13 Geo. 3. c. 43. was enacted, which regulates the bounty according to the price at the port, but does not say a word about an average price. What then is the ground on which a new construction is to be made? I profess I cannot see: it was very easy for parliament to have said, if they had thought fit, or had judged it wise so to do, that the bounty should be regulated according to the average price of corn, &c. I really can see no ground upon which the commissioners of excise proceed.

The court upon the argument had observed, that the verdict could not stand, because an action for money had and received will not lie against an excise officer for an over-payment, and that the word "*strong*" beer ought to have been inserted: for the stat. 1 Geo. 3. relates to "*strong*" beer only. But these objections were very candidly waived by Mr. Serjeant Walker. Lord Mansfield now ordered it to be stated, that the defendant by consent waived the irregularity in the finding, and the omission of the word "*strong*" beer; for his Lordship added, it might be of great inconvenience, if this case should hereafter be made a precedent, that an action for money had and received, will lie against an officer of revenue for an over-payment.

The rest of the judges concurred.

Postea delivered to the plaintiff.

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versus
BROOKS-
BANK.

An action
for money had
and received
does not lie
against a
revenue offi-
cer to reco-
ver an over-
payment.

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Same day.

BUTLER *versus* COOKE.

An uncerti-
ficated
bankrupt
may be a
witness to decrease but not to increase the fund.

THIS was an action on the case for goods sold and delivered. *Non assumpsit*, and verdict for the plaintiff.

Upon shewing cause why a new trial should not be granted, the question was, Whether one *Baker* who had been twice a bankrupt, but had not obtained his certificate, could be admitted as an evidence to prove that the goods in question were delivered to the defendant on the credit and for the use of him the bankrupt, and not on the defendant's own account. At the trial he was rejected as being an interested witness.

Mr. *Cox* and Mr. *Innys* against the new trial objected, that *Cooke* being a creditor to a very considerable amount, the bankrupt was interested in lessening his debt as an inducement to *Cooke* to sign his certificate, and therefore his evidence was clearly inadmissible.

Mr. *Lucas* in support of the rule. This is a second commission, under which the inclination of the creditors to sign or not to sign the certificate is of no avail: for by stat. 5 *Geo.* 3. c. 30. no man can obtain his certificate under a second commission, unless he pays 15 s. in the pound.

Mr. *Buller*, on the same side, cited the case of *Langden* and others assignees of *Walker* *versus Walker*, Mich. 13 *Geo.* 3. B. R. as in point. "That was an action for money due to the bankrupt from the defendant, and was tried at the sittings after *Trinity* term 13 *Geo.* 3. before Lord *Mansfield*; upon the bankrupt being called as a witness on the part of the defendant, an objection was taken to his competency, because he had not obtained his certificate. But Lord *Mansfield* over-ruled the objection. Afterwards, on a rule to shew cause why a new trial should not be granted, upon the ground of his being an incompetent witness, per Lord *Mansfield* and the court, it is a settled rule, that a bankrupt may be a witness to diminish the fund, though he has not obtained his certificate; because, in so doing, he speaks most manifestly against himself: for he may not only defeat his title to the benefit which the law allows him if the fund is of a certain amount, but he ha-
zards

“zards the displeasure of all his other creditors. But he is not a good witness, for the purpose of enlarging the fund, unless he gives a release and has got his certificate.”

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Lord Mansfield. This is a very clear case. The circumstance of this being a second insolvency, makes no difference with respect to the principle. A bankrupt who has not obtained his certificate, may be a witness against himself, but not for himself; that is, he may be a witness to decrease the fund, but not to increase it: And in this case, his evidence clearly goes to decrease it. Therefore he is a competent witness. The consequence is, that the rule for a new trial must be made absolute.

The three other judges concurred.

ORTON *et al.*, assignees, *versus* VINCENT *et al.*, bail
of BEDFORD.

Wednesday,
May 11th.

MR. Buller had moved to stay the proceedings in this case upon the assignment of the bail-bond, upon payment of costs and the sum sworn to; the defendant in the original action being dead. Mr. Mansfield, who shewed cause, said, this was not the practice where the bail-bond is assigned, though it might be allowable upon putting in bail above: but after assignment, the bail can only redeem themselves by payment of the debt and costs. It was so settled in *Savage v. West*, 9 Geo. 3. Mr. Wallace there shewed cause, why, upon payment of eleven guineas (the sum sworn to) and costs, all proceedings on the bail-bond should not be staid; and why an *exoneretur* should not be entered on the bail-piece. The court discharged the rule, and held, that the plaintiff in the action was entitled to recover not only the sum sworn to, with costs, but the whole debt due.

Where the plaintiff might have had judgment against the original defendant, the bail below are liable for the whole debt and costs.

Mr. Buller in support of the rule. The distinction is, where the plaintiff could not have had judgment in the original action: there, it is clear, that the proceedings may be staid upon payment of costs only. 1 *Barnes* 48. 63. 2 *Barnes* 79. Those cases are in conformity to the general rule of the court, never to make a bail-bond stand as a security, where the plaintiff can be put in as good a condition as if he had never been delayed. Here, the declaration was delivered on the 8th of February last, and the defendant died in the vacation. Therefore, as the plaintiff could not have had a verdict, nor, of course, judgment under the stat. 17 Car. 2. c. 8. he could have reaped no benefit from the suit. He

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hoped therefore the court would, under these circumstances, stay the proceedings upon payment of costs only; without the addition of the sum sworn to, as prayed by the rule.

But it appeared, by Mr. *Mansfield's* affidavit, that the plaintiff might have proceeded to trial in the original action, at the sittings after last *Hilary* term; and as the defendant did not die till after that time, the plaintiff might of course have entered up judgment in the beginning of this term, under the stat. 17 Car. 2. c. 8.

Per Curiam. The practice is settled, that where the plaintiff might have had judgment against the original defendant, the bail below are liable for the whole debt and costs: and in this case it is clear he might have had judgment against the original defendant. Therefore let the rule be discharged.

Same day.

GRIBBLE *versus* ABBOT.

MR. *Cowper* had moved to stay the proceedings in an action upon the judgment, pending a writ of error. Mr. *Buller* on shewing cause, produced an affidavit, in which it was sworn, that the defendant himself had acknowledged that the writ of error, which had been depending two years, was merely for delay.

The court ordered, that upon the defendant's confessing judgment in this action, and undertaking to bring no writ of error thereupon, execution should be staid till the determination of the writ of error depending. Mr. Justice *Aston* said, the court had made a like rule a few terms ago.—It was then objected, that the defendant might still bring his bill in equity. But the court said, they could not make him undertake to waive his right in that respect.

Friday,
May 13th.

BLANDEORD *et al.* executors, *versus* FOOT.

A defendant who has been superseded, for want of being charged in execution within two terms after judgment, cannot be

held to *special bail* in an action brought upon such former judgment; but he may be charged in execution, after judgment obtained in the second action.

THIS was a rule to shew cause why the writ of *capias ad satisfaciendum*, issued in this cause, should not be set aside for irregularity, and why the defendant should not be discharged out of the custody of the sheriff of *Middlesex* as to this action.—The defendant had been superseded for want of being charged in execution within two terms after judgment. Eight years after, the executors of the original plaintiff brought an

action

action of debt on the former judgment; and having obtained judgment in this second action, caused the defendant to be taken on the *ca. sa.* mentioned in the rule; whereupon Mr. *Baldwin* moved as above.

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And now, on the part of the defendant, he insisted upon it as an universal rule, that where a defendant has been once discharged out of custody, at the suit of a plaintiff, he can never be taken in custody again at the suit of the same plaintiff.

Mr. *Buller* contra. The rule does not extend so far as Mr. *Baldwin* has laid it down; it goes no further than that the defendant shall not be held to *bail* in the second action. But he may be taken in *execution* after judgment obtained in such second action: because the debt is not the same as that for which the original action was brought, but is increased by the costs, and in the present case by interest. He cited *Poulter v. Salmon*, *Hil. 13 Geo. 2. Barnes* 383. where the defendant having been superseded after judgment for want of being charged in execution, and being taken in execution upon a judgment obtained in an action on the first judgment, applied to be discharged. The C. B. took time to consider of it. The next term the defendant obtained a rule to be carried to the next assizes, to be discharged on the Lords' act: But this last rule was discharged by the court, and nothing further was done on the preceding rule. Therefore he insisted, it was a sufficient authority to shew that a defendant may be taken in execution in a second action.

Mr. Justice *Aston*. (Lord *Mansfield* absent.) A defendant cannot be taken in custody again upon the *same* judgment after being superseded; nor can he be held to bail in a second action; but in a new action, I incline to think he may be charged in execution. In *Bonnevell versus Owlett*, *Mich. 19 Geo. 2. R. B. Wright* Justice thought he could not, but *Denison* Justice doubted whether the court could prevent it; because the second judgment was for costs also. That case was adjourned.

Curia advisare vult.

The next day, Mr. Justice *Aston*, (Lord *Mansfield* absent,) delivered the opinion of himself and the other two puisne judges.

We have looked into the authorities, and are of opinion that in this case the rule must be discharged. In the case of *Wright administrator versus Kerfwill*, *Barnes* 376. *Mich. 10 Geo. 2. C. B.*

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C. B. a distinction was taken between a *superfedeas* upon *mesne* process, and a *superfedeas* after judgment obtained: in which case it was decided, "that as the defendant had there been discharged by *superfedeas* before judgment, he was not finally discharged, and therefore liable after judgment to be taken in execution; though where a defendant is superseded after judgment, for want of being taken in execution within two terms after judgment obtained, his person cannot afterwards be taken in execution." Here that case stopped: but the proceedings were all in the *same* action, not in a *new* one, upon a former judgment. Then in the case of *Poulter versus Salmon: Hil. 13 Geo. 2. C. B. Barnes* 383. which was precisely the same as this case, there was no decision; because a subsequent application was made by the defendant, pending the consideration of the court upon the *superfedeas*, to bring him up to the next assizes to be discharged upon the Lords' act; and he had a rule accordingly; but this last rule was afterwards discharged, as being inconsistent with the application for a *superfedeas*. Upon looking into the rule of *C. B. Hil. 8 Geo. 2.* we think its sole object was to prevent the defendant from being held to bail in a new action: for it provides only, that if after a *superfedeas* an action of debt be brought upon the judgment, a *common appearance* shall be accepted for the defendant in such action: but it is totally silent as to execution, or the proceedings thereupon. In the case of *Bonnewell versus Owllett, Mich. 19 Geo. 2. B. R.* which I thought had received no decision, I find, by the assistance of Sir James Burrow, who was so diligent as to remain in court till 9 o'clock at night on the last day of the term, that it was decided, and the rule discharged. His note is as follows: November 7th, Mich. 19 Geo. 2. The defendant, who in a former action against him had not been charged in execution in due time, had a new action brought against him on the former judgment for debt and costs. Upon a rule to shew cause why he should not be discharged, the question was, Whether his person could be now taken in execution upon this second action?—Lee Chief Justice, Denison and Foster thought the court could not deprive the plaintiff of the benefit which the law entitled him to. But Wright thought this would be an effectual method for the plaintiff to evade the benefit intended for defendants (who were insolvent) by the Lords' act. *Adjournatur.* Before I proceed to the subsequent determination of this case, I must observe, that as to evading the Lords' act, in 2 Str. 943-

Maud

Maud versus Branthwaite, the court would not allow of such evasion. In that case, the defendant being in custody, the plaintiff obtained judgment; and instead of charging the defendant in custody (whereby he would be entitled to his discharge on the Lords' act) the plaintiff brought an action of debt upon the judgment, and charged him in custody. But on application to the court, when he had lain two terms after the judgment, the court discharged him on common bail: saying, "it was a trick to deprive the defendant of the benefit of a merciful law." So that the party shall not deprive a defendant from receiving this benefit by a trick.—To return to the case of *Bonnevell versus Owlett*, thus much having passed as before stated on the 7th of November; afterwards, on the last day of the term, Sir John Strange of counsel for the defendant owned, that the defendant had never been charged in execution upon the first judgment, though he had lain long enough to have been charged if the plaintiff had thought fit to have done so. Whereupon the court were clearly of opinion that he might now be taken in execution, *having never been charged in execution before*; and accordingly discharged the rule.

This case is precisely in point; and to be sure the reason of the thing is exceedingly strong; namely, that the defendant *never* has been charged in execution. The benefit of common bail may be reasonable before judgment; but that is no reason why after judgment he should not be charged in execution. Therefore upon the authority of *Bonnevell versus Owlett*, and the reason of the thing, my brethren and I are of opinion, that the rule should be discharged.

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FOOT.

REX *versus* BINSTED and others, burgesses of Portsmouth.

Saturday,
May 14th.

UPON shewing cause why an information in the nature of a *Quo warranto*, should not be granted against the defendants, to shew, by what authority they claimed to be burgesses of the borough of *Portsmouth*; the Objections were: *First*, That there was not a sufficient majority to elect. *Secondly*, No summons. *Thirdly*, The day on which they were elected was a day appointed by the charter itself for other business, and not for election.

The discretion of the court, in granting an information in the nature of a *Quo warranto*, within twenty years, is to be guided by circumstances.

Exception

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REX
versus
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Exception was taken by Mr. *Buller*, who shewed cause, that the Town clerk, upon whose affidavit alone the information had been prayed, was as fully apprised of all the objections stated in the affidavit, at the election of the defendants seven years before as at the time of the present application: and therefore, being the only prosecutor, the information ought not to be granted at his instance: and cited the case of *Rex v. Radnor*, 1 *Bur.* 781.

To this it was answered by Mr. *Bearcroft* and Serjeant *Glynn* in support of the rule, that there is no general rule for the court to refuse an information, because the prosecutor was present at the proceeding complained of, and did not immediately apply. That in this case the Town clerk was not the prosecutor, but a witness only, from his office capable of giving the best evidence relative to the right mode of election: but at the same time merely ministerial; without power to advise or remonstrate against any illegality in the proceedings of the corporation. He only informs the court of the fact, and swears to the custom.

Lord *Mansfield*. The court has very rightly established it as a general rule, that after twenty years undisturbed and peaceable possession, they will not grant an information under the discretionary power given them, by the stat. 9 *Ann. c.* 20. This rule does not interfere with the right of the crown to prosecute by the Attorney General, who may file his information *ex officio*: but it was adopted by the court upon principles of public convenience, and by analogy to many other cases. The limitation has by some gentlemen been thought *too long*: and several applications have been made to parliament to narrow it; but the legislature hitherto has not thought proper to interfere. The occasion which gave rise to it was the prosecution against the borough of *Winchelsea*, * *Mich. 7 Geo. 3.* in which the court was so struck with the attempt to impeach a possession of thirty years, that they thought it necessary to fix some certain point of limitation, beyond which they would not go back to disturb a franchise so long acquiesced in; and accordingly the rule above was established. But the court declared at the same time, that though *twenty* years possession should be a bar without any other circumstances, yet they did not mean to be understood, that under *circumstances* they would not refuse an information even *within* that period: and accordingly in one * of the *Winchelsea* causes, a solemn judgment was given against the application under the particular circumstances of that case. But *no* rule has been laid down as *decisive* respecting an information *within* that time

2 *Bur.* 1962.

4 *Bur.* 2022.
2121.

time: but it depends upon a variety of circumstances. If the party applying has been guilty of any iniquitous practice, the court will not admit his complaint as a sufficient ground for granting an information. And in *Rex v. Lewis*, 1 Bur. 780. there was improper behaviour in the person applying. So, if the defence depends upon a matter of fact, which may be lost or made difficult of proof by length of time, though within twenty years; and the party applying lies by, till this evidence of defence may be lost, as in the case of residence. Another set of circumstances weigh very much; namely, where many derivative rights, and many corporate acts may be overhauled so as to endanger the dissolution of the corporation.

Let us then consider the circumstances of the present case. It appears here that some champion on the other side has first thrown the gauntlet, and disturbed the peace of the corporation; and that all would have been quiet if the other side had not been the aggressors. This is a sort of defence rather than an attack. There is no lying in wait by the person on whose affidavit the information is prayed; no difficulty of proof with respect to any matter of fact. On the contrary one of the matters in question is a general custom which can be easily proved the one way or the other. The possession is but a possession of seven years, from which no great distress is likely to arise, and with respect to the conduct of the person upon whose affidavit the application is founded, the office of town-clerk, which he holds, does not oblige him to be acquainted with the regularity of the proceedings, or to impeach for want of it. But the material circumstance is, that he is not the prosecutor, but a witness only; and it is not so much an attack as a defence.

The other judges concurred.

Rules made absolute, fourteen in all.

THE END OF EASTER TERM.

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REX
versus
BINSTED.

TRINITY TERM

14 GEORGE III. B. R. 1774.

Monday,
June 6th.REX *versus* Inhabitants of BODENHAM.

A *Certiorari*
pro rege lies
on stat. 13.
Geo. 3. c. 78.
sect. 24. re-
lative to
highways
before tra-
verse of the
indictment
or judgment
thereupon.

THIS was an indictment upon the stat. 13 Geo. 3. c. 78. for a nuisance in the highway. The prosecutor had taken out a *Certiorari* which the defendants had moved to supersede, and now upon shewing cause why a *procedendo* should not issue, Mr. Wallace insisted, that sect. 24 of the stat. which provides, "that no indictment or presentment shall be removed by *Certiorari* till such indictment be traversed, and judgment thereupon given," does not extend to the crown, but only to a *Certiorari* at the instance of a defendant. That the above clause is copied from the very same clause in the stat. 22 Car. 2. c. 12. sect. 4. and cited the case of *Rex versus Farewell*, 2 Str. 1209. where the court held, that the clause, in the last mentioned statute, related only to a *Certiorari* moved for at the instance of defendants and not to a *Certiorari pro Rege*.

Mr. Bearcroft *contra* for the defendants admitted, that the King has a right to try his own cause in whatever court he pleases: but here a private person is the real prosecutor, and therefore not entitled to the same privilege.

But *per cur*: In cases of this sort there is no distinction; and the words "till such indictment be traversed, &c." shew very plainly that this clause was not intended to take away a *Certiorari* at the instance of the crown: for the King does not traverse. It was calculated only to prevent defendants bringing a *Certiorari* for delay. Therefore let the rule be made absolute.

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Same day.

THIS was a rule to shew cause, why an order of sessions made for amending a rate or assessment made for the relief of the poor of the parish of *St. Botolph* in the town of *Cambridge* should not be quashed for the insufficiency thereof.

A corporation seized of lands in fee for their own profit, are within the meaning

of stat. 43 *Eliz. c. 2.* inhabitants or occupiers of such lands, and, in respect thereof, liable in their corporate capacity to be rated to the poor.

The substance of the case stated was as follows: That *Philip Gardner*, burfar of *Catharine Hall, Cambridge*, appealed from a poor rate, whereby he was charged the sum of 2 *l.* 15 *s.* for 55 *l.* per annum. That about the years 1754 and 1755, the master and fellows of the said college purchased five houses in the parish of *St. Botolph* of the annual rent of 55 *l.*; and being so seized thereof, pulled them down and converted the ground upon which they formerly stood, in the first place, towards erecting twelve apartments for the reception of six fellows and six scholars, upon the foundation of *Mr. Ramsden*: that this building adjoined the old college; but had never been inhabited: that another part was taken into the master's garden: that about 140 feet in length of the college walls, together with the gates, stood upon another part which was taken into the college court, and inclosed by the walls: a part, between the college walls on the outside and the street, was appropriated towards making an area, and planted with trees for ornament: And on the residue were erected two houses adjoining to each other, one inhabited by the college butler and his family, the other by the college porter, both without the college; the former having no communication with it, but through the latter there was an entrance for the society to come into the college after the gates were shut. That both the butler and the porter had the entire use of their respective houses without the college intermeddling therewith, and took in lodgers and boarders. That after the houses were pulled down, the rates and taxes of the parish ceased, and from 1761 to 1769 no rates or taxes were paid by the master and fellows; that the parish then assessed the college to the land-tax at the rate of 55 *l.* a-year rent for the premises. That the master, &c. paid the same from that time that at the same time the parish rated them for the premises to the poor rate for 55 *l.* in the same manner as in the rate is set forth. That the said *Gardner*

now

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now is, and at the time of making the rates was, burfar of the said college. This court therefore is of opinion, that the said rate or assessment as to all persons named therein (except the said *Philip Gardner* for the master and fellows) should be confirmed, and as to the assessment on *Gardner* that the same should be amended by striking out the said charge on him, and rating the *master* and *fellows* for the said premises, except such part as is taken in for the new buildings for six fellows, and six scholars in the proportion following.

The reverend Dr. <i>Prescot</i> master of the said college	£. s.
for part of his garden, - - -	1 0
The master and fellows for the house erected for the butler, - - -	4 0
Ditto for ditto for the porter, - - -	3 0
Ditto for ditto for the rest of the premises added to the college court, and for part of an area to the college, - - -	43 15

Mr. *Mansfield* shewed cause. The question is, Whether the master and fellows of *Catharine Hall* are liable to be rated to the poor for this area, which formerly had houses built upon it? Two objections are made, *First*, that by law no corporate body is rateable to the poor. This objection is founded upon what fell from Mr. Justice *Yates* in the case of *Rex versus Inhabitants of St. Bartholomew the Less*, Trinity term 9 Geo. 3. B. R. But such opinion is not supported by any case or reason; on the contrary, it has been decided, that corporations, having lands, may be rated, and have been considered as *inhabitants* in respect of such lands. 2 *Inst.* 703. Lord *Coke* in his exposition of the stat. 22 Hen. 8. c. 5. for the repair of bridges, commenting upon the word *inhabitants*, with respect to what persons are included under that description, says, “every corporation and body politic having lands, &c. *que propriis manibus possident et habent*, are *inhabitants* within the purview of this statute. If they are *inhabitants* as to the repair of bridges within the purview of the stat. 22 Hen. 8. they are equally so as to rates made under the stat. 43 Eliz. for the relief of the poor. In *Thursfield versus Jones*, Sir *Thomas Jones*, 187. the court held, that the master and wardens of the company of wax-chandlers were chargeable to the repairs of the church in respect of their corporate lands. It is clear from these two cases, that

corporations having lands in their occupation, may be charged to the repair of bridges, and to church rates.

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With respect to the opinion of Mr. Justice *Yates* in *Rex versus St. Bartholomew the Less*, the court did not determine that case upon the ground of the governors, &c. not being rateable as a corporation; but because there was no person belonging to the hospital, who could properly be called an inhabitant or occupier. Here the master and fellows occupy the area in question, and have the benefit of it; and the remedy of distress is open if they refuse payment.

The *second* ground of objection is, that these areas are in such a state as to yield no profit. But in point of fact they do yield profit; for they render the situation more healthy, and therefore in more request. But the yielding or not yielding profit is not the consideration that renders them rateable, but the circumstance of occupation:—He admitted that the rate upon the butler's house, and upon the porter's lodge, ought to have been made upon them personally, and not upon the college.

Mr. *Dunning* and Mr. *Pemberton contra*.

Corporations are not rateable, because the remedy of imprisonment, upon failure of distress, is impossible; and the remedy of distress alone inadequate. As to church rates, they differ from the present case, for we are now upon the positive words of an act of parliament; and according to *Skin. 27.* in the case of *Thursfield versus Jones*, the question, whether a corporate body was rateable to the church rate or not, was not before the court. Corporations were not in the contemplation of the legislature under the stat. 43 *Eliz. c. 2.* The word *inhabitants*, in that statute, means inhabitants that can be committed upon failure of a *distress*. It is not material what other description of inhabitants may be found in Lord *Coke* or elsewhere: they do not apply to this case. The word *inhabitants*, in this act of parliament, was only introduced to make personal property liable which did not lie in occupation. It is true, positive provisions may make corporations liable: and perhaps without such positive provision, some corporations may *sub silentio* have submitted to be rated to the poor. But neither of these apply to the present case.

The case of *St. Luke's* hospital shews, that nothing can be rated which does not yield a profit. The advantages gained by this area are just like those which were gained to *St. Bartholomew's* hospital by their area. But with regard to the profit

1774. accruing from it, the subject-matter excludes the possibility of rating it: for nothing is more apparent than that where property is the subject of a rate, the value of it must be certain, because the measure of the profit is the measure of the rate. But here nothing is or can be received, and therefore there can be nothing to pay.

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Lord *Mansfield* asked if any inquiry had been made into the fact of corporate bodies being rated, such as the *South-sea* house, *India* house, &c. Mr. *Mansfield* mentioned the *Barbers' Company* being rated for their hall. Mr. *Wheeler*, the corporation of *Coventry*: and Mr. *Lucas* added that many of the *Companies* of the city of *London* were rated, and the only question had been whether over-rated or not.

Lord *Mansfield*.

This is a question of a great deal of consequence.—And the usage under the statute 43 *Eliz. c. 2.* is very material: for great care must be taken to get at certainty in determinations, and to avoid overturning settled practice. It was that consideration which made me ask how the fact was, with regard to corporations. For if corporations have been usually rated all over the kingdom for above a century, there will be little inconvenience in adopting that usage. If on the contrary they have not, it will be a strong argument in support of the objection, that they are not rateable.

* 2 Burr.
1064.

In the case of *St. Luke's** hospital, I recollect that I put it upon this question; "Was there any body there who could be rated as occupier?" In that case the difficulty arose from a matter of substance, not form: for they could find nobody to rate. There were three sorts of persons only who could be charged as occupiers: 1st. The servants of the hospital: 2dly. The poor madmen who were the objects of the charity: and 3dly. The Trustees. With regard to the first, a clear distinction was taken between them and the officers of other charitable foundations, such as *Chelfea* hospital, who have been held rateable, not as servants of those charities, nor as inhabitants of the ordinary lodgings; but as having separate apartments, which were considered in the light of dwelling-houses. 2. As to the poor madmen there could be no doubt of their not being rateable. 3. The next were the trustees; but it being stated in the case that they were mere nominal trustees for the poor objects of the charity, they were held upon that ground not to be rateable. Upon

looking

looking into the note of that case, I find I observed, that if there were a fourth description of persons who might properly be charged as occupiers, they would not be included in or affected by the judgment which the court was about to give.

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* 4 Burr.
2435.

Then came the case of *St. Bartholomew* *, and the grounds upon which that case was determined coincide exactly with the reasoning in the case of *St. Luke*. In the case of *St. Bartholomew* it was stated, that *Henry* the 8th in the 38th year of his reign granted all the said hospital to the corporation of *London*, and directed that it should be for the use of the poor. That after the fire of *London*, several houses were made in the hospital for the benefit of the citizens of *London*, who were then first charged to the poor rates, as occupiers of those houses. That in the year 1730, some of the ancient buildings together with some of these houses were pulled down: that since that time four large piles of building had been erected, amongst the rest one containing a hall for the governors to meet in, &c. That in 1758 the officers of the hospital were first rated to the poor, owing to the opinion given in the case of *Chelsea* hospital. In 1766, the quadrangle of the hospital being completed, the governors pulled down eighteen houses to make an area for the benefit of the patients; for which area the governors were rated. And the question was, "Whether the governors were or were not "rateable for this quadrangle and area?" From these facts it appeared that in its origin it was for the benefit of the poor, and though after the fire of *London*, houses were built upon the ground for the use of private individuals, who as occupiers of those houses were rateable and rated; yet being returned to its original use, the use of the poor, and appropriated as a means of preserving their health, without any profit to the corporation, the court held that the governors, who were merely trustees for the poor, ought not to be rated for it. Therefore I am satisfied with my own opinion in saying, that the grounds and reasoning in the two cases of *St. Bartholomew* and *St. Luke* are alike. The principle is this, that by the stat. 43 *Eliz. c. 2.* no man can be rated except as an occupier or inhabitant. Mr. Justice *Vates* indeed started a doubt, whether a corporation could be rated as inhabitants or occupiers, and did say, I believe, what has been mentioned, namely, that a corporation cannot be an inhabitant or occupier. This would have been a great authority, if the opinion had been given with consideration; but it was immediate, without time to reflect on it. But that point was not essential

1774. to the decision, and all the court agreed in the determination of the case upon the other ground.

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In this case, the question is, whether a corporation seized in fee for their own profit, is rateable or not; which is a very different question, and depends upon this point; whether in law a corporation may not be considered as occupiers or inhabitants? By the statute of 43 *Eliz. c. 2.* all lands and all real property are rateable to the poor, and must have, except in the cases just mentioned, occupiers and inhabitants in consideration of tax: therefore if a man has no tenant, if he is seized of lands, &c. in fee, he is said to occupy them himself or by his bailiff, &c.

Most of the old colleges are extraparochial, and upon that ground they are not rateable. But except upon that foundation there has been no instance cited that a corporation is exempted from this tax; and I can find no authority in point of law which says they cannot be rated. But there are some, that go very far to prove the contrary. The first I shall mention, though not the most ancient, is the *Ironmongers' company versus Naylor*, reported in 2 *Mod.* 185. Sir Thomas Jones 85. 1 *Ventr.* 311. and 3 *Kemble* 719. which was a distress for hearth-money: there was no doubt or question in that case whether as a corporation they were rateable or not; but whether they could properly be said to be the occupiers; the houses for which the tax was levied never having been finished. The court held they were. The authorities from 2 *Inst.* 703. and 1 *Jones* 187. shew, that corporations are rateable both as inhabitants and as occupiers: and if liable in respect of the repairs of bridges and churches, they are equally so within the purview of the stat. 43 *Eliz. c. 2.*

The next objection made to this order is, that these areas yield no profit, and therefore ought not to be rated. The answer to that is, that the value is in the judgment of the assessors. If land undergoes any alteration, the assessors must take all the circumstances into their consideration when they are about to fix the value: It would be an absurd rule to say, that lands not covered with houses, should pay the same as they did when houses were standing upon them. The rates must be according to the value of the thing to be rated; and the duties increase according to the increase of agriculture or improvement. But it seems a very extraordinary thing for the college to suppose that they are to take in all these lands and pay nothing for them. I do not say what value is to be set upon them, nor

will this determination give a sanction to the particular value fixed by the present rate: but they must be of some value; and whatsoever the *quantum* may be, I am of opinion that the college in its corporate capacity is rateable in respect of it.

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Mr. Justice *Aston*. I concur. The premisses in question must be of some value: and as to the *quantum* it is the province of the overseers to decide, not the court.—I have no idea but that a corporation may be *occupiers*: as such, they may have inspection of the rates; and upon an application to the court for that purpose, it would be no answer to say, they are an invisible body; for they may inspect them by their servants and the court would punish a refusal by attachment.—As to the *remedy* of levying a duty upon a corporation; the books all agree that it can be levied, though they differ in the mode. *Sheppard* in his treatise upon corporations says, “If a sum of money be to be levied upon a corporation, it may be levied upon the mayor or chief magistrate, or upon any person being a member of the corporation.” The words are taken from *Styles* 367. and are what was said by *Roll C. J.* in the case of the town of *Colchester*.—But *1 Ventr.* 351. in the case of the City of *London* concerning the duty of water-bailage is different, and is thus: “Note, It was said, that for a duty or charge upon a corporation, every particular member thereof is not liable; but process ought to go in their public capacity.” And this is the right law. In *Thursfield* versus *Jones*, *Skin.* 27. the corporation were cited not by their proper names, but in their *politic* capacity: and the court said, “if the company had neither land or goods there was no way to make them appear: but if they stood out, then they must lie by the heels in their natural capacity.” Therefore the idea that a corporation is not liable to be rated, or amenable by process in respect of a rate is not well founded.

By a late act 17 *Geo.* 2. c. 38. the remedy of distress is extended beyond the particular parish, into other precincts, and even into other counties. So that their property is answerable though they cannot personally be punished.

Therefore I am clearly of opinion that as a corporation they are liable to be rated, and that the order of sessions is good: though, in respect of the *quantum*, an appeal is still open if the college think themselves aggrieved. Mr. Justice *Willes* and Mr. Justice *Ashurst* concurred.

The court ordered that the order of sessions be quashed so far as the same relates to the porter and butler therein mentioned,

1774. ed, and that the rest and residue of the matters therein contained be affirmed.

Tuesday,
June 7th.

The Mayor of LYNN *versus* TURNER.

CASE
against a
corporation
for not re-
pairing a
creek into
which the
tide of the
sea flowed
and reflowed
(but not
saying it
was a navi-
gable river),
a. from time
immemorial
they had
been used,
the action
lies, tho'

ERROR from a judgment of the court of *common pleas* in an action upon the case against the corporation of *Lynn Regis* for not repairing and cleansing a certain creek or fleet called *Dowhill fleet* into which the tide of the sea was accustomed to flow and reflow as from *time immemorial they had been used*, whereby the sea was prevented from flowing therein, so that the said creek was rendered unnavigable, and the plaintiff obliged to carry his corn round about. The declaration consisted of nine counts: the *second* count stated *no special damage*, but only charged generally, that the plaintiff had lost the use of his navigation. Judgment by *nihil dicit* and damages upon a writ of inquiry.

no special damage be stated. And saying "*as from time immemorial they had been used*" is well enough, without alleging that they were bound, &c. *ratione tenuræ*, or other special cause.

Mr. *Baldwin* for the plaintiff in error. If any one count is bad, the judgment may be set aside. Upon the face of this record it appears that the *locus in quo* is a navigable river, where the tide flows and reflows, and the second count is general without any special damage being stated. If so, the injury complained of is not the subject of an action but of an indictment. For wherever a river flows and reflows it is in the nature of a highway, and is common to all. *Davis* 56. *Sid.* 149. 1 *Mod.* 105. 1 *Salk.* 357. and where an injury is received by a nuisance or obstruction in a highway, it is incumbent on the party to shew a particular damage: otherwise an action does not lie. 1 *Inst.* 56. *Carth.* 191. *Cro. Eliz.* 664. 5 *Co.* 73.

Lord *Mansfield*. *Ex facto oritur jus*. How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so; for there are many places into which the tide flows that are not navigable rivers; and the place in question may be a creek in their own private estate.

Mr. *Baldwin*. Then it was incumbent on the plaintiff to shew a special reason or tenure why the corporation ought to repair, for they are not bound of common right. 2 *Lord Raym.* 1089. 1 *Salk.* 360. S. C.

Lord

Lord *Mansfield*. It is here alleged that the corporation have from time immemorial been used to repair. It states, therefore, that they are bound by prescription, and it might be the very condition and terms of their creation or charter.

The three other judges concurred.

Let the judgment be affirmed.

1774.

Mayor of
LYNN
versus
TURNER.

HARWOOD *versus* GOODRIGHT, Lessee of ROLFE.

Tuesday,
June 7th.

ERROR from the *Common Pleas* upon a judgment in ejectment of a set of chambers in *Lincoln's-Inn*. The cause was tried before Sir *William de Grey*, Lord Chief Justice of the court of *Common Pleas*, at the sittings after *Trinity* term 1773; when the jury found a special verdict, stating in substance as follows:

A subsequent will, though it be found to contain a different disposition from a former, if the former will.

particulars of that difference be unknown, is no revocation of such

That *John Lacy* of *Lincoln's-Inn* Esq; on the 16th day of *April* 1748, being seised in fee of the chambers and premises in the declaration of ejectment mentioned, and possessed of a considerable personal estate, and also entitled to the interest of 10,000*l.* by virtue of the marriage settlement of his father of the 3d of *April* 1688, and a private act of parliament, (by which the said sum of 10,000*l.* was directed to be raised and laid out in the purchase of lands, and which was raised accordingly, but never invested in land,) made his will in writing duly attested to pass real estates; and did thereby devise as follows; that is to say, "I *John Lacy*, of *Lincoln's-Inn* in the county of *Middlesex*, do make this my last will and testament with my own hand, as follows; I give, devise, and bequeath, all my real and personal estate, of what nature or kind soever, or wheresoever it be, unto my dear and well-beloved friend Mrs. *Frances Harwood* now of *Maiden Lane* in the parish of *Covent Garden*, *Westminster*, and her heirs, executors, administrators, and assigns for ever; desiring her to pay certain legacies: and I do hereby constitute and appoint the said Mrs. *Frances Harwood* to be the sole executrix of this my last will and testament, revoking all others by me heretofore made." That in the summer of the year 1756, the said *John Lacy* of *Lincoln's-Inn*, being in like manner seised as before mentioned, did make and duly publish another will and testament in writing, in the pre-

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versus
GOOD-
RIGHT.

sence of three subscribing witnesses, who duly attested the same, That the *disposition* made by the said *John Lacy*, by the said will of the year 1756, was *different from the disposition* in the said will of 1748; but in *what particulars is unknown to the said jurors*; but the said jurors say, that they do *not* find that the said testator *cancelled* his said will of the year 1756, or that the said defendant destroyed the same; but what is become of the said will, the jurors aforesaid are altogether ignorant. That the said testator *John Lacy Esq*; died in *June 1767* seized in fee of the said premises in the said declaration mentioned, without issue, and was never married. And that the said *Elizabeth*, the wife of the said *William Rolfe*, the lessor of the plaintiff, is the neice and heiress at law of the said testator *John Lacy*.

The question was, Whether the devise in the will of 1748 to the defendant was revoked by the will found to be executed in 1756?

De Grey Chief Justice, *Gould* and *Nares* Justices gave judgment in the *Common Pleas* for the lessors of the plaintiff against the opinion of Mr. Justice *Blackstone*; upon which judgment this writ of error was brought.

Mr. *Davenport* for the plaintiff in error. This case must be decided upon two or three leading principles.

First, That as there is a clear indisputable title in Mrs. *Harwood* under the will of 1748, the lessor of the plaintiff in ejectment must shew a subsequent title equally clear and indisputable.

Secondly, A subsequent substantive independent will of lands is not in itself a revocation of a former will, nor will operate as such, unless it contain expresse words of revocation, or a devise of the same lands repugnant to and inconsistent with such former disposition. *Cro. El.* 721. *Cro. Jac.* 94. and the case of *Hitchen versus Bassett*, reported in 1 *Show.* 537. *Hardr.* 374. 2 *Salk.* 592. *Comberb.* 90. and 209. 3 *Mod.* 203. *Show. Park. Cas.* 146. where this point was at last finally settled and adjudged.

But *thirdly*, suppose a subsequent independent will of lands would revoke a former, yet it must appear what the contents of such latter will are. For the mere finding another will does not *ex vi termini* find a repugnant or different disposition: and twenty devises of the same lands may stand together, unless they are inconsistent

Lord

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RIGHT.

Lord *Mansfield* asked the counsel, if they had considered whether in point of law the court could grant a *venire facias de novo* after a writ of error brought: and instanced two cases, *Hafwell* versus *Gballice*, and *Rex* versus *Kynaston* where the House of Lords had done so: adding, that the House of Lords could not, as a court of error, have such jurisdiction, unless the court of *King's Bench* had the same.

Friday,
June 10th.

Mr. Serjeant *Hill* *contra*. The notion and doctrine of wills, arises from the civil law, and is borrowed from it: The notion respecting express revocations was established by the stat. 32 H. 8. c. 1. before which statute there could be no will of lands except by custom. But presumptive revocations existed before that act. The notion that a subsequent will is a revocation of a former, is founded on the nature of the instrument itself; because if it were the intention of a testator that his first will should stand at the time of making a second, the latter would be a codicil, and not a will. Therefore, wherever there are two independent wills, the latter is a revocation of the former. *Swinburne* 15. No man can die with two testaments, because the latter does always infringe the former, 523. *S. P. Perkins*, sect. 478. *Shep. Touchstone* 410. *Hardr.* 376. *per Hale C. B.* Apply this doctrine to the present case. It is found that the will of 1756 was duly attested to pass real estates, and that the testator, who was emipent in the law, had no real estate but the chambers in *Lincoln's Inn*. This is strong evidence of a change of intention in the testator, and consequently sufficient to prove, that the new disposition was different from the former: otherwise it was nugatory to make it. At least the execution of the second will renders it very doubtful, whether Mrs. *Harwood* is entitled to any thing; and it is a settled rule, that where it is uncertain who is to take, the heir at law shall be entitled. The case of *Hitchins* versus *Bassett* is in favour of the defendant in error: for the grounds upon which the court decided that case were, that there was no proof of any change of intention whatsoever in the deviser, or that the second will in any way related to or affected his lands. But in the present case, it is sufficiently found by the mode of devising, that the second will did relate to lands, and to the very estate in question; because he had no other real estate; and it is expressly found that the disposition of 1756 is different from the disposition in 1748. Therefore, under all the circumstances, this finding amounts to an express revocation of the will in 1748.

Lord

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Lord Mansfield. Let it stand for a second argument: but I will just state the short compass in which the question lies. Though, as to personal estate, the law of *England* has adopted the rules of the *Roman* testament, yet a devise of lands in *England* is considered in a different light from a *Roman* will. For a will in the civil law was an institution of the heir. But a devise in *England*, is an appointment of particular lands to a particular devisee; and is considered in the nature of a conveyance by way of appointment; and upon that principle it is, that no man can devise lands which he has not at the date of such conveyance. It does not turn upon the construction of the stat. 32 H. 8. c. 1. which says, that "any person having lands, &c. may devise." For the same rule held before the statute, where lands were devisable by custom.

It is upon the same principle, but carried too far by subtlety, that there have been revocations determined contrary to the intent of the testator; as where he has afterwards made a scoffment or the like; because that has been construed a new appointment. Such is the difference between the *Roman* will and a devise of lands in *England*.

But it may be said, that if there is a complete second will, it cannot do otherwise than revoke a former: for if it is only a variation or *subtraction* from a former will, it is in the nature of a codicil. Now with regard to land, a subsequent devise of land must be inconsistent with a former devise of the same land, or the first will stand as a good subsisting devise; for if the testator gives it to *A.* and does no other act which will transfer it to a third person, the original devise to *A.* remains good. There must therefore be an inconsistent disposition in the whole or in part; if there be an inconsistency in part, it is a revocation as to that part only. As where a testator devises an absolute estate in fee to *A.* and afterwards, by a subsequent devise, gives him only an estate-tail in the same land; it is a revocation to the extent of the difference between an estate-tail and an estate in fee.

In the present case, the question arises upon certain facts found by the special verdict: but the argument has gone upon presumption only: and much has been said which would have been very fit for the jury to have considered. The opinion of the court must be guided by conclusions drawn from the facts stated, which are; That the defendant had a title by descent: but a will is found which defeats that title. It is not found that

that this will was revoked. But the jury find that the testator made a second will. It is stated that the disposition made by this second will is *inconsistent* with the devises contained in the former? No; but they find it to be *different*: and if the verdict had rested there, there might have been a ground of argument to say, that *different* was a general finding applicable to the whole will, and therefore it must mean *totally* different. But the jury go on to say, that *they do not know wherein the difference consists*. If the jury cannot find it, the court in such case cannot presume the difference. The jury might have had evidence to prove an inconsistent disposition or circumstances to lay a fair foundation for presuming it to be so, as spoliation or the like: but no such circumstance appears; they merely find a second will, and as to what alteration it made in the former, they say they are totally ignorant. How then can the court say it? For the court cannot presume any thing. The mere circumstance of making a second will is not in itself a revocation of a former: for the testator may cancel such latter will, and it has been settled that if a man by a second will even revoke a former, yet if he keep the first will undestroyed, and afterwards destroy the second, the first will is revived. In this case the jury do not say a syllable as to the second will being in *esse* at the time of the testator's death. The matter seems to me to lie here. It must be shewn that upon this special verdict the jury have found the second will to be in some particular repugnant to or inconsistent with the first: whereas the only reason that has been assigned for supposing it to have been different from the first, is that the testator made another will.

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Afterwards in *Mich.* Term it was argued by Mr. *Wallace* for the plaintiff, and Mr. *Lee* for the defendant, when Lord *Mansfield*, after stating the case, delivered the opinion of the court as follows:

Each party insists that upon this special verdict there is a title found in their favour: the plaintiff (now defendant in error) says there is a clear title for him, as *heir at law*; the defendant, that there is a clear title for her, as *devisee*: and neither party has contended, that there is any such defect or repugnancy in this verdict, as to render it uncertain for the court to proceed upon it, and I think rightly: for there is a title found for one or the other. Nor has either side moved for a *venire facias de novo*; if they had, this court as a court of error could have granted it.

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In considering this special verdict, the duty of the court is to draw a conclusion of law, from the facts found by the jury; for the court cannot presume any fact from the evidence stated. Presumption indeed is one ground of evidence; but the court cannot presume any fact. In case the defendant had been proved to have destroyed this last will, it would have been a good ground for the jury to find that this was a revocation. But the jury on the presumption must have found the fact. So with regard to all the other circumstances; such as the presuming it to be in her hands, and that there were three attesting witnesses to the will: these would have been proper for the jury to have considered; but we are confined to the facts found by them: which are as follow:

They have found the defendant to be heir at law of *John Lacy*: as such he would have a clear title if there were no other claimant by settlement or will. The title of an heir at law is not to be defeated by conjecture, ambiguity, or uncertainty; and even where there is proof of a will having existed, which however does not appear, the court cannot go into conjecture what it is probable the testator may have done by that will; but it must be shewn to contain an actual express devise which disinherits the heir at law. But in the present case, the jury have found a clear title against the heir at law: for they have found a good subsisting will, properly attested, and an express devise to the plaintiff in error, concerning the construction of which there is no doubt. For even in the case of an actual devise, a proper meaning, as I have before stated, must be found to disinherit the heir at law. Here a clear devise is given against him: therefore he must get rid of this title and prove his own by other facts to be found in this verdict; which if it were the truth of the case he might do, either by shewing that the will under which the devisee claims is revoked, or that the testator had no power to devise. In this case there is no dispute as to the testator's power to devise: therefore a revocation must be shewn, and the mode of doing that is by another will. But that is not all; for he must shew in fact, that it was *revoked* by another will which *subsisted* at the death of the testator; because if a testator makes one will and does not destroy it, though he makes another at any time virtually or expressly revoking the former; if he afterwards destroy the revocation, the first will is still in force and good.

If a subsequent will, either virtually or expressly revoking a former will, be destroyed, the former, if subsisting, is revived.

But

But what is there in this case to shew, that the will of 1756 ever revoked the devise of the chambers in question? The plaintiff in the original cause rests it on two grounds: First, that there is a contrary devise, if it can be made out; the clear answer is, if there is a contrary devise, it is against the heir. But it is contended, that, because the jury say there was a different disposition, the court is to presume that there was a different disposition of the subject-matter in question. Properly speaking, *another* will cannot exist without there being a difference: because, if it be exactly the same, it is no more than a duplicate or a republication of the first will: the jury therefore finding it to be another will, *ex vi termini* say, it was different.

It is necessary in a personal testament to make an executor, but not so to a devise of lands, which must be revoked expressly by a subsequent will. The jury here have not found any revocation of the former will: nor is there any in point of law; for the mere circumstance of making another will is not virtually a revocation of a will of land. I can see no difference between the case of *Killigrew's* will and this. For in that case, the jury, by saying there was *aliud testamentum*, certainly found a difference: here they say it was different, but add, that they do not know in what the difference consists; this special verdict therefore does not find a revocation.

The second ground which the defendant rests upon is this; that it is uncertain whether the will be revoked or not; and where the heir at law claims, his title shall never be taken away by an uncertainty. But this is all a fallacy; for here the devisee does not set up an uncertainty; she shews a clear title under the will of 1748. On the contrary it is the heir at law who sets up an uncertainty against her. Upon the whole, I think the jury have not expressly found that the devise of the chambers in the will of 1748 was revoked by the will in 1756. Therefore,

Let the judgment be reversed.

Afterwards, upon an appeal to the House of Lords, the judgment of the court of *King's Bench* was affirmed: the barons of the Exchequer attended (except Mr. baron *Perrot*) and were all of opinion with the Judges of the *King's Bench*. *Pasch.* 15 *Geo.* 3.

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Same day.
One possessed of three species of estates in the county of H. viz. one by articles wholly executory, another executory in part and a third (being an advowson) completely executed by a recent conveyance, devises to his wife as follows:
"All the manors, messuages, advowsons and hereditaments in the county of H. for the purchase whereof I have already contracted and agreed, or in lieu thereof, the money arising by the sale of my real estate in the county of L;" (with directions for completing the conveyance).—The advowson, the purchase of which was completely executed before the making of the will, shall pass.

ERROR from the *Common Pleas* upon a judgment in *Quare impedit* of the advowson of the church of *Mottisfont* alias *Motson East Dean*, and *Lockerly* in the county of *Southampton*, claimed by the plaintiff in error, under a grant made to him in fee, 2d *December* 1766, by Lady *Broughton Delves* widow of Sir *Brian Broughton Delves* deceased; who claimed such advowson as devisee under the will of her late husband Sir *Brian*. The cause was tried at the assizes holden for the county of *Southampton* on the 26th of *July* 1773, when the jury found a special verdict in substance as follows:

"That on the 13th of *June* 1763, Sir *Brian* contracted by articles of agreement with Sir *Thomas Gatehouse*, for the purchase of the manor of *Upper Clatford* in the county of *Hants*, in consideration of 10,000 *l*; the purchase money to be paid, and the conveyance completed, on or before the 25th of *March* 1764. That, on the 30th of *October* 1763, Sir *Brian* further contracted by articles with the honourable *Thomas Pitt*, for the purchase of the manor of *Abbots Ann*, and also the advowson of the parish church of *Abbots Ann* in the county of *Southampton*, in consideration of 24,000 *l*; 7000 *l*. being paid in part, and the remaining 17,000 *l*. to be paid at the time of completing the purchase and executing the conveyance; which was to be on or before the 25th of *March* 1764. —That on the 10th of *February*, 1764, Sir *Brian* purchased of *Thomas Fuller* and others, and took a conveyance to himself in fee of the advowson * of *Mottisfont* in the county of *Hants*, in consideration of 2,500 *l*. the money being paid down and the deed executed on that same day."

That being so seised in fee of the said advowson of *Mottisfont*, and being entitled in equity to the several estates contracted for by the said articles, which then remained to be carried into execution, and being seised in fee of divers manors and estates in the county of *Stafford*, and of certain copyhold estates of inheritance in *Suffolk*, and of a small freehold estate in the county of *Salop*, and seised for his life (under his marriage settlement) of divers manors and estates in the county of *Chester*, with remainder to his first and other sons successively in tail male, (subject to her jointure of 1000 *l*. a year, and to one other jointure of 1000 *l*. a year to his mother,) with reversion to himself in fee; and being likewise seised in fee of

* The advowson in question.

a real estate in the county of *Lincoln*, which he had contracted to sell by articles to *George Foster Tuffnell Esq.* in consideration of 27,000*l.* which was to be paid on completing the purchase; DID, on the 21st *May* 1764, duly make and publish his last will and testament; wherein, after bequeathing his dwelling-house in town, together with his jewels, plate, household furniture, &c. to his wife *Lady Mary Broughton Delves*, her heirs, executors and administrators respectively, to and for her and their own proper use and benefit; he proceeds thus:

"*Also I give, devise, and bequeath to my said wife and her heirs, to and for her and their own proper use and benefit, all the manors, messuages, ADVOWSONS, farms, lands, tenements, hereditaments, and real estate whatsoever, situate and being in the county of HANTS, FOR THE PURCHASE WHEREOF I HAVE ALREADY CONTRACTED AND AGREED, with all and every the appurtenances, and all my right, title, and interest, in and to the same; OR IN LIEU THEREOF the whole money arising by the sale of all my real estates in the county of Lincoln, and SUCH FURTHER SUM AND SUMS of money as together with the money arising from such sale shall be sufficient to enable my said wife or her heirs to COMPLETE the several CONTRACTS I have made as aforesaid, for the purchase of the SAID ESTATE AND PREMISES in the county of Hants; in trust nevertheless to COMPLETE the said PURCHASES, and to procure and take CONVEYANCES of the same estates, in the county of Hants, to her and their own proper use and benefit.*" He also gave to trustees and their heirs, all and singular his manors, messuages, advowsons, farms, lands, tenements, tithes, hereditaments and real estates whatsoever, situate, arising, and being in the counties of *Stafford* and *Chester*, or either of them, to the use of his brother *Thomas Delves* for life, with remainder to his issue in strict settlement, with divers remainders over. And then, after certain pecuniary legacies, the testator gave all the residue of his personal estate to his brother the said *Thomas Delves*.

"That the said articles of 13th *June*, and 30th of *October* 1763, were in force at the time of making his said will; and that since his death, the respective premises had been conveyed to *Lady Broughton Delves*. That at the time of making his said will, Sir *Brian* was seised of no other advowson in the county of *Southampton*, except the advowson of *Mottisfont*, comprised in the conveyance of the 10th of *February* 1764; nor had he contracted for the purchase of any manor, messuage, advowson, &c. in the county of

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of *Southampton*, which rested in contract, other than those mentioned in the articles of 13th *June* and the 30th of *October* 1763: Nor was he seised of or entitled unto any *advowson* or *advowsons* in the counties of *Stafford* or *Chester*. That, on the 1st of *February* 1766, the said Sir *Brian* died without revoking or altering his said will, and without issue: leaving *Thomas Delves* his only brother and heir at law, now Sir *Thomas Broughton*. That the said Sir *Thomas Broughton*, on the 6th *June* 1772, conveyed the *advowson* of *Mottisfont* to *Robert Hill* clerk and his heirs for the sum of 3,825 *l*.

The question arising upon this verdict was, "Whether the said *advowson* of the church of *Mottisfont* passed to Lady *Broughton Delves* the testator's widow, by virtue of that clause in his will, whereby the testator gave and devised to his said wife all manors, messuages, *advowsons*, &c. in the county of *Hants* for the purchase whereof he had contracted and agreed: for if not, then the said *advowson*, being undisposed of by the said will, descended to the said Sir *Thomas Broughton* as heir at law to the said testator?"—The court of *Common Pleas* were of opinion, that the *advowson* of *Mottisfont* did not pass by this clause to Lady *Broughton Delves*; and gave judgment for the now defendant in error, upon which judgment this writ of error was brought. This case was argued twice; first in *Easter* term 1774, by Serjeant *Walker* for the plaintiff, and Serjeant *Glynn* for the defendant, and now in this term, by Mr. *Mansfield* for the plaintiff, and Mr. *Dunning* for the defendant.

For the plaintiff it was contended, that this was an express devise to Lady *Broughton* of the *advowson* of *Mottisfont*, it being situate in the county of *Hants*, and not only contracted for but actually conveyed to the testator before the making of his will: that a contrary construction would render the word "*advowsons*" in the plural number of no effect; the testator not having contracted for any other *advowson* in *Hampshire* except the *advowson* in question, and that of *Abbots Ann*: and, therefore, that the rule of law, which in the exposition of all instruments, and more especially of wills, prefers such a construction as will give effect to every expression in them, ought to prevail in this case.—To this point was cited the case of *Mirrill* versus *Nichols*. 2 *Bulstr.* 176. where "a testator, having two several *moieties* of lands by several purchases in *Kent* and in *Essex*,
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“ devised as follows: *And as to my moieties, I devise all my moieties in Kent unto B.*” and made no mention of the moiety in *Essex*: but the court held that *both passed*, for the words being “ *All his moieties*,” the intention of the testator could not otherwise be satisfied. So in the case of *Thorpe versus Thompson*, 2 Leon. 120. Ander. 188. S. C. where *A.* purchased land of *B.* but before any conveyance executed *B.* sold the land to *C.* and then *A.* conveyed to *C.* who being thus seised devised it thus: “ I bequeath to *R.* my son, all my land which I purchased of *B.*” whereas in strictness of law he purchased them of *A.* by virtue of the conveyance made to him by *A.* But the court held the devise good, it being a sufficient description of what land the testator meant. They cited likewise the cases of *Chester versus Chester*, 3 P. Wms. 56. *Goodright* on the demise of *Paul v. Paul*, 2 Bur. 1089. and *Dyer* 376. And agreeable to the doctrine laid down by these authorities, insisted, that, in the present case, the words “ *contracted and agreed for*” ought not to be construed restrictive of the general expression “ *All my manors, lands, messuages and advowsons*,” so as to exclude the advowson actually purchased; because, in strictness of language, no estate can be said to be purchased without being first contracted and agreed for. But further, the testator’s intention to devise the advowson in question, which ought to be the rule of construction in this case, was manifest, from his using the word “ *advowsons*” in the plural number; and again from the expression “ *already*” which was a strong proof that he meant to include all the real property in *Hampshire* of which he was then the owner. That in the common acceptation and meaning of the words “ *contracted and agreed for*,” there was no distinction between them and a purchase, and that in equity such a contract would be a very good purchase.

On the part of the defendant it was insisted, that an heir at law ought not to be disinherited by any other than a necessary implication: that in the present case, the words “ *for the purchase whereof I have already contracted and agreed*” could not by any necessary inference be extended to relate to a purchase actually completed; nor indeed by any possible construction whatsoever, unless a contract executory means the same as a contract actually executed. That such an interpretation would go the length of making them include any purchase however distant, as well as one of a more recent date: in which case no line can be drawn between a space of three months, and one of three-score years.

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For the *resting in contract* being a *designatio rei* must cease to be applicable to an estate on the instant of the purchase being *completed*, or must continue applicable to it *for ever*.—That if no other circumstance however was sufficient to explain the testator's meaning, the words immediately following the words "*agreed*" "*for*" were of themselves decisive: namely, "*or in lieu thereof, the whole money arising from the sale, &c. as together, &c. shall be sufficient to enable my said wife, &c. to complete the several contracts as aforesaid.*" The estates therefore meant to be devised by the testator as included under the above description, must of necessity be such only, the contracts for the purchase of which were still subsisting, and which might or might not for ever remain incomplete at the option of the testator's wife and her heirs; the money given in *lieu thereof* amounting in the one case to a full satisfaction, and in the other to the express sum requisite to complete such contracts. Again the subsequent direction to Lady Broughton, to procure and take proper conveyances of these estates, excludes all possibility of supposing that the testator had in contemplation at the time of this devise, a reference to an estate, concerning which no contract was subsisting, for completing the purchase of which no money was due, of which no conveyance remained to be procured or taken, but which had before the making of his will been completed, purchased by, and conveyed to the testator.—That no deduction to be drawn from the testator's using the word "*advowsons*" in the plural number could avail the plaintiff in this case; because the same expression is used by him in the devise of his *Staffordshire* and *Cheeshire* estates, where it appears that he had no *advowson* at all. On the contrary, it was plain from this circumstance, that the testator meant to use it merely in a *general and comprehensive*, not in any *particular sense*.—That even the common presumption that a testator does not intend to *die intestate* as to any part of his estates could not obtain here, as he had actually done so in respect of his estates in *Suffolk* and *Salop*: that there was as little ground therefore for supplying a disposition of the advowson of *Mottisfont* about which the will was likewise perfectly silent, as there would be of them: that in either case it could be founded in conjecture only; which by no rule of law is sufficient to disinherit an heir at law.

Lord Mansfield. If this question had come before the court precisely under the same circumstances as it did in the case of *St.*

John

*John versus Errington**, the opinion given then, would have no influence upon the opinion that is now to be given. On the contrary, the judgment which has since been delivered by the court of *Common Pleas* would considerably shake that decision.

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An heir at law cannot be disinherited by conjecture. It can only be done by express words, or by an implication which manifestly indicates the clear intent of the testator, upon a fair construction of the whole contents of the will, to give the estate from him.

I have struggled as much as I could to agree with the judgment of the court of *C. B.* in this case; and I thought yesterday I had persuaded myself to do so: but upon reading the whole of the will attentively, and finding the circumstance of the money supposed in the argument to be given by way of equivalent, to be founded on a mistake, I cannot satisfy myself to reject the words of the testator in this case. He has made use of the word "advowsons," and the whole dispute is, whether the word "advowsons" shall be understood to mean *advowsons*, so as to convey an idea, that the testator understood the real force of the expression at the time; or whether it is to be rejected, as being merely inserted by him among other *general* words, without any particular meaning or intention annexed to it.—If it is to be understood as applied to these *two*, there is no doubt but it will include the recent purchase, and in that case there is an end of the question. To be sure, there might be cases, where from the subject-matter, it ought to be rejected; but the present is a case under very particular circumstances. It is manifest from the facts stated in the special verdict, that the testator's object was to buy estates in *Hampshire*; and to enable him in part to do so, he intended to sell his estates in *Lincolnshire*: and all this was upon one plan, which he was carrying into execution, and wished to complete in as little an interval as circumstances would admit of. The dates of the several transactions are very material.

* *St. John versus Errington*, Hilary term 13 Geo. 3. was an action of covenant for a defect of title in the conveyance of the 2d of December 1766 (the living being then full): and on a case reserved in *B. R.* the court were of opinion that the *advowson* passed by the will, and therefore the title was good. But the devise respecting the *Cheshire* and *Staffordshire* estates, and the fact of the testator having no *advowson* in either of those counties, though he there likewise uses the word "*advowsons*" amongst other general words, made no part of the case then before the court.

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On the 13th of *June* 1763, he contracts for lands in *Hampshire* to the amount of 10,000 *l.*; the money to be paid and the estates conveyed on or before the 25th of *March* 1764.

On the 30th of *October* 1763, he articles for other estates in *Hampshire*, including an *advowson*: he pays 7,000 *l.*-in part, and the residue of the purchase money being a sum of 17,000 *l.* was to be paid and the conveyance executed on the 25th of *March* 1764. In the intermediate time, that is, on the 10th of *February* 1764, he purchases the *advowson* in question, and has an immediate conveyance made to him upon payment of the purchase money.

So that there are three species of estates which he had to dispose of. One, by articles that rested *wholly executory*: another by articles *not wholly executory*, nearly a third part of the purchase money having been paid: and a third that had been carried into *execution* by a very recent conveyance. On the 24th of *May* following, Sir *Brian* makes his will. Whoever drew this will must have been privy to these recent contracts: one was totally executory, one executory in part, and the third a complete contract. He thought to include the whole under one description: therefore, to shew such general intention of the testator, he says “for the purchase whereof I have ALREADY contracted and agreed,” not, “for the purchase whereof I have ONLY contracted and agreed.” He did not intend any future purchase should pass; but only those he had recently entered into. If he had said “only contracted and agreed,” the purchase of Mr. *Pitt*, of which great part of the purchase money had been advanced, would not have passed; because that contract and agreement was more than made, it was partly carried into execution. He puts in the word “advowsons”. Shall the meaning of this word be excluded because he has used the expression “for the purchase whereof I have already contracted and agreed?” Has he in fact less agreed for a recent purchase, because he has actually completed it? In point of *intention* I think it is impossible to conceive that he meant to except the particular *advowson* in question. An argument was greatly relied on that would have been very strong indeed, if it had been well founded; which is this, that he could mean only to include the *executory* contracts, because he has given *in lieu* thereof the money to arise from the sale of the *Lincolnshire* estates. Now every equivalent must be supposed to be co-extensive with the thing for which it is intended as an equivalent. It has been said

said that 27,000 *l.* the money arising from the sale of the *Lincolnsbire* estates would just amount to the purchase money of the estates under contract executory in *Hampsbire*. But on looking into the will, the fact does not warrant the assertion; for though the words are "*in lieu thereof*" which implies an alternative, yet he could not mean to substitute the one for the other; because 7,000 *l.* had been paid in part of one of the estates; and 27,000 *l.* was the sum that remained to be paid in order to complete the several purchases. The sum of 27,000 *l.* therefore is in fact 7,000 *l.* short of the real value and purchase money of the estates under contract; consequently it could not be intended as an equivalent for them, but only as a fund to complete the purchase.

The whole question depends upon this single point, whether there are words in the will sufficient to pass the advowson in question. If there are not, the heir cannot be disinherited. But here the word "*advowsons*" is used; and, in order to decide for the heir, we must entirely reject it. I do not think we are at liberty to do so: because I think the testator meant the word "*advowsons*" should have its full force and effect: and no argument arises from his having inserted the same word in the devise of his other estates, where in point of fact there were no advowsons: because his object was to dispose of all he was possessed of. Therefore I am of opinion that by the word "*advowsons*," both the advowsons pass.

Aston, Justice. The great stress of argument in *C. B.* was upon the words "*in lieu thereof, &c.*" making an alternative devise. I think it clearly otherwise; and that it was intended only as a fund to complete the purchases which the testator had agreed for with Sir *T. Gatehouse* and Mr. *Pitt*, and had no relation to the advowson already purchased. Therefore I concur in opinion with his lordship, that by the clear intention of the testator, and upon the plain and manifest meaning of the words, both the advowsons do pass.

Mr. Justice *Willes.* I am of the same opinion.

Mr. Justice *Ashhurst.* I am of the same opinion.

Per Cur.

Let the judgment be reversed.

Upon a writ of error in the House of Lords the judgment of the court of *King's Bench* was affirmed.

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A grant or charter from the crown, which ought to be by matter of record, may, under circumstances, be presumed, though within time of legal memory.—In this case the presumption was founded on a possession of 350 years and adjudged by the court a sufficient ground.

The Mayor of KINGSTON upon HULL *versus* HORNER.

UPON a rule to shew cause why a new trial should not be granted upon the ground of a misdirection to the jury, the case appeared, upon the report of Mr. Justice Gould who tried the cause, to be as follows. The declaration consisted of six counts, stating, that the plaintiffs on the 5th of June 1772, and long before and ever since, had received, and were lawfully entitled, and still of right ought to receive, amongst other tolls and duties, a reasonable toll or duty called *water-bailiffs dues* for certain goods, specified in the particular counts, imported into the port of *Kingston upon Hull*; that the defendants having imported, &c. and being liable, &c. promised, &c. Upon the general issue pleaded, the plaintiffs at the trial produced 1st. an entry from their corporation books intitled as follows; “A particular note of
“all such duties, &c. as by the water-bailiffs are to be received, for
“the use of the mayor and burgesses of *Kingston upon Hull*; according to the order prescribed and set down in the year 1441,
“*John Bedford* then being mayor; and continued and put in use
“from that time to this present day 1st April 1575.” In this list were included the duties in question. 2dly, An order of the corporation of the 13 *Eliz.* requiring the water-bailiff, every eight or fourteen days to give an account of all monies received by him for the use of the town, to the chamberlain; with a direction to the latter, to keep these accounts separate from his other receipts: then followed a particular account of these monies so received from 1545 to 1646: other entries, from 1648 to 1678, of persons who had rented the office of water-bailiff; an account of the dues for three years in 1726; and concluded, by the parol testimony of several witnesses who had paid the duties in question from the year 1734, together with an estimate of repairs done by the corporation valued at 15,000 *l.*—On behalf of the defendant *contra*, it was observed, that the earliest book of the corporation was 16 *Ed.* 3. and the date of their original charter of incorporation 27 *Ed.* 1. a full century subsequent to the time of legal memory. That their title, if any, to the duties in question could be supported only by prescription or charter: That the first certainly did not exist, they being a corporation within time of legal memory: and in respect of the second it was clear upon the face of a charter granted anno 5 *Ric.* 2. that the king at that time only erected or authorized the corporation to erect the port; but granted no duties. The words of this charter 5 *Ric.* 2. were

as follows: *Concessimus quantum in nobis est, &c. quod habeant portum subtus eandem villam dudum vocat. Sayercreek jam Hull, in perpetuum annexum villa, ita quod possint edificare domos kaias et stæithas, ad emendationem, defensionem et salvationem villa prædictæ.* To this it was answered, that an usage of three hundred years was a sufficient ground to presume a grant of the duties in consideration of repairs, which it was in proof the corporation had constantly done from the year 1441 to the time of bringing the action. Mr. Justice Gould in his direction to the jury said he thought, and therefore left it to them to say, Whether the words *portum DUDUM vocat. Sayercreek JAM Hull* did not imply that the port so called was an existing port before and at the time of the charter 5 Ric. 2: rather than a creation of the port: and also, Whether they would not consider the usage from the year 1441 to the time of the action brought, a sufficient ground to presume a grant of the duties between the 5 Ric. 2. (anno 1382) and the year 1441. The jury accordingly found a verdict for the plaintiff.

Mr. Wallace and Mr. Davenport shewed cause. There are two questions. 1st. Whether a grant can be presumed at all? 2d. Whether under the circumstances of this case a grant ought to be presumed?—1st. Circumstances within time of memory may be a foundation to presume a grant. In the case of *Powell v. Milbanke** a grant from the crown was presumed; though within time of memory.

In 2 Show. 47. *Rex. v. Carpenter*, evidence of constant payment and an antient table of duties was held sufficient ground to presume a grant of water-bailiff dues (as in this case) on coals to the city of London, though the use of them was within the time of legal prescription.—In *Warren ex dem. Webb v. Grenville* 2 Str. 1129. an item in an attorney's bill to make a tenant to the *præcipe* was held sufficient evidence of the deed in support of a

chapel of *Chester le Street*, in the county of *Durham*, was in the crown from the dissolution to the time of *Jac. 1.* who by letters patent under the seal of England, bearing date the 26th of July 1618, granted to Sir *James Ouchterlony* and *Richard Gurnard*, their heirs and assigns, All that the deanry, prebend, rectory and vicarage of the collegiate church of *Chester le Street*, in the bishopric of *Durham*, with the following exception “Exceptis tamen semper et extra hanc presentem concessione nostram nobis heredibus et successoribus nostris omnino reservatis omnibus et singulis *advocationibus* donationibus liberis dispositionibus et juri personal. om. et singul. ecclesiasticar. vicar. capell. et al. beneficior. ecclesiasticor. quorumcumq; præmiss. superius per præfentes præconcess. aut alicui inde parti vel parcellæ quoquo modo spectant. pertinent. incident. appenden. vel incumben.”

In 1629, anno 5 Car. 1. the premises came by mesne conveyances to the *Hedworth* family, who afterwards granted to Sir *Ralph Milbanke*—That in 1694 Mr. *Hedworth* presented Mr. *Conyers* to the curacy of *Chester le Street*, and that in 1735 Mr. *Lambe* was presented by a descendant of the *Hedworth* family, and continued in possession till 1769, when Sir *Ralph Milbanke* presented the defendant. Upon these facts, one point insisted on by the plaintiff was, that the exception in the grant left the title to this curacy in the Crown. But Lord *Mansfield* left it to the jury to say, Whether from the two adverse nominations, and possession under them, by the *Hedworth* family, they would not presume a grant from the crown of the right of presentation to the curacy. The jury presumed a grant, and found a verdict accordingly.

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* *Grain*
Lord Mans-
field, Sit-
tings after
Michaelmas
term 1772.
The plain-
tiff declared
for money
had and re-
ceived. On
non assumpsit
pleaded, it
appeared in
evidence,
that the

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recovery of forty years standing. But 12 Rep. 4. *Crimes v. Smith*, and 12 Rep. 5. *Bedle v. Beard and others* are in point. Therefore *ancient possession* is clearly a sufficient foundation to presume a grant from the crown within time of legal memory.

2d. Whether in this case, a grant ought to be presumed? If ancient possession is a sufficient ground, the corporation have unquestionably been in possession of these duties 300 years and upwards; namely, from the year 1441. The water-bailiff's table is of that date, and that alone clearly could not be the origin of the claim. It is further in evidence, that the corporation have constantly repaired the port at an immense expence, which is a strong ground to presume a legal title. Therefore, if a grant is presumable, it ought to be presumed in this case,

3dly. The charter 5 Rich. 2. is a grant of an *antient* port then *existing* and not the *creation* of a *new* port: The words are *Portum dudum vocat. Sayercreek JAM Hull*; which shews that it had before been known by the name of *Sayercreek*, and was not then for the first time erected and made a port. If so, the grant incidentally carries the duties along with it, and the consideration of the repairs is a good and valid consideration.

Mr. Dunning, Mr. Lee, Mr. Wilson, and Mr. Norton in support of the rule.

1st. The question is not, Whether in any case a grant is not presumable; because every prescription carries in itself presumption of a grant; and in this case, if the date of the charter had been antecedent to the time of legal memory, the jury might very rightly have presumed a grant of the duties. But the question is, Whether an usage which must have had its commencement within time of legal memory, is alone sufficient to be left to the jury of a grant from the crown, which ought to be by matter of record? The law says, that such evidence of an usage as will support a prescription, is a sufficient title; that is, a sufficient ground to presume a grant. If any usage less than that were sufficient, prescription would be useless. Therefore it is not competent to the jury to presume a grant, where the usage does not refer back to the time of legal prescription. The case in 12 Co. 4. *Crimes versus Smith*, is not inconsistent with this position; and in *Bedle versus Beard and others*, 12 Co. 5. there is nothing which confines the grant of the advowson to a less recent date than the grant of the manor. But a strong argument to shew the improbability of any such grant having been in this case, arises from the abundant caution in this corporation to preserve all their most antient deeds and records,

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For there are no less than three charters of confirmation in the reigns of *Hen. 4.* *Hen. 5.* and *Hen. 6.* immediately succeeding that of *Ric. 2.* besides many others from *temp. Hen. 8.* to that of *Jac. 2.* all which it was totally unnecessary to have preserved; and yet the essential original charter is to be presumed to be lost in a case where the corporation itself never had an idea, much less any evidence of its having even existed. Under these circumstances the non-production of it ought not to be supplied.

Second Point. The charter 5 *Ric. 2.* was not a grant of a port then existing; on the contrary, there was no port in the crown at all at that time. If there had been, no doubt but the grant of it would incidentally have carried the duties with it. But the words of this charter are clearly words of qualification; and at furthest grant only a liberty to the corporation to erect a port, viz. "*Concessimus quantum in nobis est quod ipsi et heredes habeant portum in perpetuum annexum villa, ita quod possint adificare domos, kaias et flaiethas,*" &c. If the king had at that time a port and the duties incident, the qualifying clause *quantum in nobis est* would have no meaning. *Habeant portum* is not the phrase to express an existent port, nor would the subsequent words in that case have been necessary, but might have been all supplied by the single expression, *concessimus portum*. Further the subsequent words prove it was a thing *in fieri*; for there must have been quays and wharfs, if the port was then in being, and it must have been annexed to the town at that time. It is clearly therefore a grant of something that was to be in future, not of a port actually erected at that time. The non-existence of the port is further apparent from the silence of all the charters antecedent to the time of 5 *Ric. 2.* amongst which are three that grant temporary tolls. 28 *Ed. 1.* 1 *Ed. 3.* 5 *Ed. 3.* But in the charter of *Ric. 3.* and subsequent grants, the mention of the port occurs frequently. Therefore on both grounds there ought to be a new trial.

Mr. *Lee*, on the same side contended, that this claim could not have a legal commencement if the port was a newly created port by charter 5 *Ric. 2.* because the duties in such case could not be in the crown but by act of parliament; and cited 2 *Vez.* 621. *Vaugh.* 159. *Shephard* versus *Gosnold* and 12 *Co.* 34.

Lord *Mansfield.* The ground upon which an application for a new trial has been made in this case is, that there was no evidence of title in the plaintiffs to the port duties claimed by the action which ought to have been left to the consideration of the jury; and if no title was made out which in point of law it was

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fit for them to exercise their judgment upon, there ought to be a new trial.

There are two grounds upon which it is contended that there was sufficient evidence of title in the plaintiff to be left to the jury.

First. That there was an antient port of *Hull* in the king before the 5th of *Ric. 2.* with duties annexed to it, particularly those in question; which duties belonged to the king in right of the port. If such a port and duties did exist in the king, it is not disputed, nor can a doubt be made, but that he might grant them to a subject: and that they were granted is contended, from the general words of the charter confirmed by usage. If this ground can be supported, there is an end of the motion for a new trial; because the jury have had that left to them, which ought to have been left to them.

But *Secondly*, if that be not so, and if it is clear from the words of the charter 5 *Ric. 2.* that no port existed before, but that the charter itself erected the port only, without any duties; then it is contended, that between the 5 *Ric. 2.* and the year 1441, there might be some charter from the king, creating and giving these duties to the corporation, upon a ground which would support them in point of law; namely, upon the consideration of repairs, and the general advantage to be derived by the public, from its being properly kept up. This was the only point made at the trial, and the question that arises upon it is, Whether upon the evidence, it was properly left to the jury to presume such grant between 1382 and 1441?

I lay out of the case that which might have been a foundation for a new trial; I mean the idea of new light to be got from the entries in the corporation books, because there has been an inspection, and therefore no surprise: and as to spoliation, the court cannot, upon a bare allegation, after inspection had, go upon a surmise of that kind, especially as since the trial no application has been made to see them.

With regard to the first point, that is, the construction of the charter of *Ric. 2.* the case stands thus: It is proved by strong evidence, that from the year 1441, down to the rise of this question, which comprehends a period of near 350 years, these duties have been exacted and submitted to without suit or litigation. It likewise appears from a charter of the 13 *Car. 2.* which is above a century ago, that the corporation at that time made an application to the king, apprehending they had a title to these duties by virtue of a right immemorial, and the king upon their representation confirms them thus; "Whereas

" we

" we are credibly informed, that within the said town, &c. there
 " is an immemorial custom that every merchant or other com-
 " ing into the water with ships and goods, &c. and unlading
 " the same within the port of the said town, has been accus-
 " tomed to pay certain fees, &c. for the same, we will that
 " the said custom shall continue, and that the said mayor and
 " burgessees shall enjoy the like fees, &c. as of time immemo-
 " rial for the support of the great burthens and expences of the
 " said mayor and burgessees in and about the reparation, prefer-
 " vation and defence of the said port." There is a like charter
 of confirmation, *anno 4 Jac. 2.*

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But it is said these charters relate to port duties of *time immemorial*, and the corporation then built their right to them upon immemorial usage; which cannot be; because both the corporation itself, and the grant of the port by charter 5 Ric. 2. are within time of memory. But if at the time of the grant, the duties had existed immemorially in the king, the source of their claim is a prescriptive right, and their title a derivative title to that which was in the crown from time immemorial, though they themselves are a corporation within memory.

Then as to the construction of the charter 5 Ric. 2. so far from thinking it clear, that the charter meant to *create* the port; if I was to determine that question, I should hold that the port *existed before*. The grant is, that they shall have "*portum subtus eandem villam, dudum vocat. Sayercreek jam Hull.*" In the first place then consider, what is a port? It is the water: the terms are synonymous; for the limits of the water make the port. *Secondly*, What is that which is described as having been *once* called *Sayercreek*? Upon the plain construction of the words, it must be the *port* and not the town: for so early as the charter 27 Ed. 1. the town is described by the name of *Kingeston supra Hull*, meaning the river *Hull*; it is therefore apparent from this charter, that the name of the port had before that time been changed from *Sayercreek* to *Hull*; and if never granted out of the hands of the crown till 5 Ric. 2. it clearly must have remained in him at that time. He grants that the *port* shall be for ever *annexed* to the *town*; which in my opinion strengthens the construction of its being an *ancient* port; by affording an inference, that before that time the corporation had only the benefit of it, whereas in future they were to be the owners and proprietors. But there are still other words that support this construction; namely, that they should have the port "*with-*
 " *out*

1774. "out the interposition of the king's officers or ministers." This was a very material and necessary privilege, if the port had existed before, and the king's officers had been accustomed to collect the duties for the crown. But if it were a new erected port, the grant might have been considered as an absolute exclusive grant. But admitting it to be *doubtful*, whether it was an *ancient* or a *new erected* port, the question is a question of fact; and, therefore, most proper to be left to the decision of a jury; who upon the evidence which in this case was the strongest possible, namely, enjoyment for 350 years, have found in favour of the claim.

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Before I proceed to the next ground, I should observe that a question was made, whether the grant could have a legal commencement? that is, supposing the charter 5 Ric. 2. to have created the port, and the duties to have been *incidentally* granted in consideration of the repairs, whether such grant would support the claim? if the case turned upon that question only, I should take time to consider of it, and to look into the cases cited by Mr. Lee. But it seems to be taken for granted in the case of the *Mayor of Exeter versus Trinlet*, Trin. 32 & 33 Geo. 2. C. B. and afterwards in the case of the *Mayor of Yarmouth versus Eaton*, Trin. 3 Geo. 3. B. R. that ports are like markets with which the crown is entrusted, and that the king may grant the duties to a subject in consideration of repairing the port.

The next ground is, the presumption of a charter between 5 Ric. 2. 1382. and the year 1441.

Now with regard to admitting evidence to satisfy a jury that a charter did exist within time of memory which is not produced by record, my opinion is this; namely, *that all evidence is according to the subject-matter to which it is applied*. There is a great difference between *length of time* which operates as a bar to a claim, and that which is only used *by way of evidence*. A jury is concluded by length of time that operates as a bar: as, where the statute of limitations is pleaded in bar to a debt; though the jury is satisfied that the debt is due and unpaid, it is still a bar: So in the case of prescription, if it be time out of mind, a jury is bound to conclude the right from that prescription, if there could be a legal commencement of the right. But any written evidence shewing that there was a time when the prescription did not exist, is an answer to a claim founded on prescription. But length of time used merely by way of evidence,

evidence, may be left to the consideration of the jury to be credited or not, and to draw their inference one way or the other, according to circumstances. For instance, there is no statute of limitations that bars an action upon a bond; but there is a time when a jury may presume the debt to be discharged: as where no interest appears to have been paid for sixteen years. But if a witness is produced to prove the contrary, as by shewing the party not to have been in circumstances to pay, or a recent acknowledgment of the debt, the jury must say the contrary. If a foundation can be laid that a record or a deed existed, and was afterwards lost, it may be supplied by the next best evidence to be had, or if it cannot be shewn that it ever existed, yet enjoyment under a title which can only be by record, is strong evidence to be left to a jury that it did once exist. I do not know an instance in which proof may not be supplied. These are general rules, and it would be mischievous, if it were to be laid down, that there can be no presumption since the time of *Richard I.* to confirm a title by charter.

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In Lord *Purbeck's* case, the letters patent which were the only proper evidence of his title could not be found; and there was no proof of the record having been lost: but he had sat in parliament, had levied a fine of his honours to King *Charles the Second*, and I think enjoyed it to the time of his death. All the other facts were subsequent to the creation, yet the House of Lords were of opinion in favour of the claim, and presumed that the letters-patent had existed. Indeed, before the decision, the *bill* of the letters-patent was said to be found at the *Privy Seal* office; but still that was only presumptive evidence; for the king might have recalled it before it passed the great seal.

But the case of *Bedle* versus *Beard*, 12 Co. 5. determined by Lord Chancellor *Ellesmere* with the assistance of the judges upon deliberation, is a case in point, and of very great authority: and it is not liable to the distinction which Mr. *Dunning* endeavoured to make, because there was no possibility of its being a grant within memory. The case states, that in 31 Ed. 1. the king being seised of the manor of *Kimbolton*, to which the advowson of *Kimbolton* was appendant, by letters-patent, granted the manor with the appurtenances to *H. de Bohun*, Earl of *Hereford* in tail general. *Humphrey de Bohun* the issue in tail in 40 Ed. 3. granted the advowson to the Prior of *Stoneley* and his successors, by which it became impropriate. The points were two, Whether

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ther the grant of the manor "*cum pertinentiis*" passed the advowson? and adjudged that it could not: *Secondly*, Whether the grant by tenant in tail was not void? But upon this second point, it was resolved by Lord *Ellesmere* and the principal judges, that notwithstanding the advowson did not pass by the grant of the king under the words "*cum pertinentiis*," and so the issue in tail had nothing in it at the time of this grant to the Prior; yet it shall now (4 *Jac.* 1.) be intended in respect of the ancient and continual possession, that there was a lawful grant of the king to the said *Humphrey*, so that he might lawfully grant to the said priory. *For all shall be presumed to have been solemnly done*, rather than that ancient grants should be called in question, which were necessary to the perfection of the thing, though the grant cannot now be shewn. And it was further observed in that case, that ancient possession would injure instead of strengthening a title, if after a succession of ages and the decease of parties, objections should prevail which might have been answered in the life-time of the parties, and if well founded, would most probably have been sooner made.

I remember, in general, though I cannot recollect the particulars of it, a case in the *Duchy-Court* between the King and Mr. *Brown* of *Snelbrook*. It was before the late *nullum tempus* bill. The evidence in support of the title was, a possession and enjoyment of 100 years; and I held that though such possession and enjoyment could not conclude as a positive bar, because there was no statute of limitation against the crown, yet it might operate as evidence against the crown of right in the defendant, if the claim could have a legal commencement; though such commencement could not be shewn. In questions of this kind, possession goes a great way: but there is no positive rule which says, that 150 years possession, or any other length of time within memory is a sufficient ground to presume a charter. In the case of a supposed bye-law, usage is allowed to support it, without any proof of the existence of such a bye-law, or of the loss of it. But the principle is a right one, namely, in favour of rights which parties have long been in the peaceable and quiet possession of. I have myself taken it to be established in point of law, that though the record be not produced, nor any proof adduced of its being lost, yet under circumstances it may be left to the consideration of a jury, or of a court of equity, if the case comes properly before them, whether there is not a sufficient ground to presume a charter? Therefore, in the present case, taking it for granted

granted that such charter would have given the plaintiff a title, I think it was properly left to the jury, Whether they would presume such grant? I am of opinion that the direction was proper on both points: but I ground myself chiefly upon the first; that is, that it was rightly left to the jury to say, Whether there was or was not an ancient port before and at the time of the charter 5 Ric. 2.? Indeed, I should be loth to send the cause to a new trial, after an usage of 350 years, even if the fact were much more doubtful. If, upon search of the corporation-books, any new discovery shall be made that can throw light upon the subject, this verdict will be of no prejudice in a new action. Mr. Justice *Aston*, Mr. Justice *Willes*, and Mr. Justice *Asbhurst* were of the same opinion. *Per Cur.* Let the rule for a new trial be discharged.

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REX *versus* Inhabitants of HARTFORD.

Saturday,
June 11th.

ERROR from a judgment of the quarter-sessions upon a presentment by a justice of peace, that from time whereof &c. there was, and yet is, a common highway leading from the town of *Witton* in the county of *Huntingdon*, to the village or town of *Hartford*, in the said county, for all his majesty's liege subjects to pass and repass on foot over a certain drain or ditch between the ancient inclosures within the parish of *Witton* and the town of *Hartford*; but the same is broken and in such decay that the said subjects cannot pass, &c. and that the inhabitants of the town of *Hartford* ought to repair, &c.

Mr. *Davenport* for the plaintiff in error objected, that the description of this road is too uncertain; but particularly it is not laid to be in the parish of *Hartford* or in any other parish, but over a ditch between inclosures within the parish of *Witton* and the town of *Hartford*.

Lord *Mansfield*. It must be alleged to lie in the parish, otherwise the parish is not bound to repair, and, therefore, this presentment is clearly bad. *Per Cur.*

Let the judgment be reversed.

Monday,
June 13th.

Judgment
upon a writ
of inquiry
set aside,
because the
jury were
returned by
the attorney
for the
plaintiff.

BAYLIS *versus* LUCAS.

UPON a rule to shew cause why the writ of inquiry executed in this case should not be set aside, exception was taken that the jury were returned by the attorney for the plaintiff.

Mr. Justice *Aston*.—The rule must be made absolute. Upon a motion for a new trial in a cause from the *Oxford* circuit in the year 1756, it was objected, that *Penoyer Watkins* who was under-sheriff was attorney for the plaintiff, and that three of the jury were his own relations. The court said, that every trial ought to be fair and indifferent: and, therefore, ordered the rule for a new trial to be made absolute.

Mr. Justice *Ashpurff*. If the under-sheriff is attorney in the cause and returns the jury, no doubt it is a good cause of challenge. *Per. Cur.*

Let the rule be made absolute.

Same day.

FLOYER *versus* EDWARDS.

One sells
goods at
three
months cre-
dit; but si-
pulates, in
case the mo-
ney is un-
paid, that
the vendee
shall allow
him a half-
penny an
ounce *per*
month, till
the debt is
discharged.
This allow-
ance was
according to
an usage in
that parti-
cular branch
of trade,
but above
the legal
rate of in-
terest. The
contract being a *bona fide* SALE is not USURIOUS. Otherwise, if it had been merely colourable, to cover a LOAN and evade the statute.

UPON a rule to shew cause why there should not be a new trial in this case. Lord *Mansfield* read his report as follows:—This was an action brought against the defendant for goods sold and delivered at three months credit, with an agreement, at the time of the sale, that in case the money was not paid at the end of three months, then the defendant should pay to the plaintiff an half-penny an ounce *per* month for so long a time as the money should remain unpaid. At the trial it was proved that this allowance of an halfpenny an ounce *per* month as before stated, was the general usage and practice of the trade, with one or two exceptions only; but upon calculation it appeared to exceed the legal rate of interest. Upon this, an objection was made to the plaintiff's right to recover, upon the ground of its being an usurious contract, and meant only as a colour to avoid the statute. But, his Lordship said, I thought there seemed to be weight in the usage of the trade, and in the circumstance of it's being in the defendant's power to have avoided

the

the additional payment of an halfpenny an ounce *per month* by discharging the principal sum at the time it became due: and the jury accordingly found for the plaintiff, as I wished, that the contract was not usurious.

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Mr. *Dunning* moved for this rule upon two grounds. *First*, That though a loan is necessary to constitute an usurious contract, yet in a transaction like the present, the instant the limited credit is expired, from that moment, if the money remains unpaid, the condition of the parties is changed; for the buyer becomes a *borrower* and the seller a *lender*. *Secondly*, That it is not necessary to the creation of a loan, that money should be paid on the one hand, and received on the other; for the circumstance of a man's money remaining in another's hands, in consequence of an agreement made for that purpose, will equally constitute a loan. That no tradesman can recover interest upon non-payment at the day appointed, unless there be a special agreement for the purpose; and notwithstanding such special agreement, if it be usurious, as in the present case, it is as no agreement at all.

Lord *Mansfield* upon the motion said, he thought the second ground was the best to rest the question upon: for it either was, or was not, a contract within the mischief provided against by the statute. If the former, it was clearly an agreement for usury at the time of the sale; and therefore, like all other agreements whereupon or whereby more than legal interest is reserved, void: and the plaintiff of course not entitled to recover. But where a party takes more than legal interest, without any agreement at the time of the contract, there he is liable only to the penalty for the excess, and the contract remains good.

Mr. *Wallace* and Mr. *Bearcroft* shewed cause. This is no loan of money, but a communication for a *bonâ fide* sale of goods; and the circumstance of its being in the option of the party to pay the money without an increase of the price, removes every idea of its being usurious: for to make a contract usurious there must be a forbearance reserved in the contract itself, and so are the very words of the statute 12 *Ann. st. 2. c. 16.* "no one shall take directly or indirectly for loan of money, &c, above five pounds for the forbearance of 100 *l. per annum.*" *Burton's case* 5 *Rep.* 69. *Mich.* 33 & 34 *Eliz.* *Roberts versus Tremaine, Cro. Jac.* 509. *Hawk. P. C.* 245. *sect.* 3. 248. *sect.* 19.

Mr. *Dunning* and Mr. *Buller contra.* The question is, whether it is lawful for a tradesman selling goods, to stipulate that

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EDWARDS.

if the price is not paid at a certain time, a greater sum than legal interest shall be paid for the forbearance of it: and it is a question of infinite magnitude in respect of trade in general.

This is not like the cases cited, where a gross sum is stipulated *nomine pæne*: but it is the case of accumulating interest, incurring proportionably with the delay. In all those cases the lender may demand his money as soon as it is become due. But it is a fact and an ingredient of this bargain, that both parties looked to a day beyond the day of payment. For the plaintiff was not likely to call for his money when he could make 8 *per cent.* and the defendant upon such an agreement was not likely to have money to pay at the day of strict payment: therefore it is no answer to say, that he might have paid at the day: for the probability, not to say the possibility, of the case, was against his being able to do so: and the wisdom of the laws against usury consists in the protection they shew to indigent men. As to the supposed custom of the trade, the evidence is not sufficient to create a custom, for the traders are in number but five, and their practice not uniform; but if such usage did obtain in the trade, it is nevertheless void by the statute, if usurious in itself.

Lord Mansfield. The statute 12 Queen Ann. stat. 2. c. 16. prohibits any body from taking any how on the loan of money above 5 *per cent* for the forbearance of payment; and all contracts for any loan of money, goods, merchandize, &c. bearing interest above 5 *per cent.* with an agreement for principal and interest, are null and void; but with regard to principal and interest, in case the agreement originally for the payment of principal be legal, and the interest does not exceed the legal rate; but afterwards upon payment being forborn, illegal interest is demanded, there the agreement by retrospect is not void, but the parties are liable to the penalty of treble value.

This is a case on the original contract, by which the payment of the principal is stipulated; and therefore, if it is within the statute of usury at all, the contract itself is void. It depends principally upon the contract being a *loan*: and the statute uses the words "directly or indirectly."—Therefore in all questions in whatever respect repugnant to the statute, we must get at the nature and substance of the transaction: the view of the parties must be ascertained, to satisfy the court that there is a loan and borrowing; and that the substance was to borrow on the one part and to lend on the other: and where the real truth is a loan of money, the wit of man cannot find a shift to take it

out of the statute. If the substance is a loan of money, nothing will protect the taking more than 5 *per cent.*; and though the statute mentions only "for loan of moneys, wares, merchandizes, or other commodities;" yet any other contrivance, if the substance of it be a loan, will come under the word "indirectly."

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Let us examine then what the present contract is. It is said the plaintiff is a lender: let us see where there is the colour of a loan in this case. The plaintiff is a refiner, and deals in gold and silver wire; so is the defendant: and, in the ordinary course of dealing, the one buys and the other sells a quantity of this commodity on the terms and conditions before stated. There is no pretence of any negotiation for a *loan*, nor that one word passed about *borrowing* money; nor any evidence of an agreement to forbear paying the principal sum, contrary to the true intent and meaning of the statute. What are the terms of the contract? are they any newfangled terms? so far otherwise, that the agreement barely cannot be called an universal practice; yet it is the general practice of the trade. It is true the use of this practice will avail nothing, if meant as an evasion of the statute; for usage certainly will not protect usury. But it goes a great way to explain a transaction; and in this case is strong evidence to shew that there was no intention to cover a loan of money. Upon a nice calculation it will be found that the practice of the Bank in discounting bills exceeds the rate of 5 *per cent.*; for they take interest upon the whole sum for the whole time the bills run, but pay only part of the money, *viz.* by deducting the interest first; yet this is not usury. Here it appears that the whole agreement was made out first, the price of the goods fixed, and a limited credit given; but the party considers further, that perhaps punctual payment might not be made; and provides that in that case the buyer shall pay him so much more. This is no agreement for forbearance beyond the three months; the plaintiff might have brought his action instantly; and therefore, if not paid, was at liberty to say, that the buyer should pay him a greater price. The authorities go still further; and say, that wherever it is in the power of a known *borrower* of money to pay the principal within a limited time without interest; upon non-payment, the reservation of a larger sum than the statute allows, is no usury: because usury is an agreement originally to pay the principal with interest above the rate of 5 *per cent.* *Hawk. P. C. c. 82. sect. 19.* I see no manner of difficulty to arise

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from it. I lay the foundation of the whole upon a man's going to borrow under colour of buying: there the contract is usurious; but where it is a *bonâ fide* sale, as in this case, it certainly is not. I have never had the least doubt, either at the trial or since; and am of opinion as I was at that time, that the jury did right in finding that the contract was not usurious. The three other judges concurred. *Per Cur.*

Let the rule for a new trial be discharged.

N. B. After the determination of this case, Alderman *Plumbe*, who was head of the Goldsmiths' Company, brought an action against *Carter*, one of the gold refiners, for money had and received, to recover the surplus arising from this allowance of an half-penny an ounce *per* month above the principal and legal interest. The action was tried at the Sittings in London after Trinity term 1775, before Lord *Mansfield*. The defendant had paid into court, the principal and interest at 5 *per cent.* and offered to pay costs to the time of the action brought. Therefore the single question was, Whether the plaintiff could recover this surplus? Lord *Mansfield* was clearly of opinion that though the transaction itself did not amount to usury, yet it was taking a hard and unconscionable advantage; and therefore should not be assisted in an action for money had and received, which is an equitable action, and founded in conscience under the particular circumstances of each case. The jury found their verdict accordingly, and the plaintiff acquiesced without moving for a new trial.

Same days

MELSOME *versus* GARDNER.

One who is in custody at the suit of the plaintiff in the *Marshallsea* Court, cannot be removed by *habeas corpus ad respondendum* to answer to the plaintiff for the same debt in a new action in *B. R.*

THE question in this case was, whether the plaintiff, who had arrested the defendant in the *Marshallsea* Court, and had him in custody there, could, by a writ of *habeas corpus ad respondendum*, remove the body of the defendant into this court to answer to a new action here for the same debt. Mr. *Cowper* had moved to quash the writ. Mr. *Dunning* now shewed cause; and cited 2 *Lilly Prac. Register*, fol. 2. "none ought to take out a *habeas corpus* for a prisoner, without his consent, unless it be to turn him over to the *King's Bench*; or to charge him with an action in court." *Vin. abr. tit. Habeas corpus*, fol. 210. "Where a person is in custody in an inferior jurisdiction, the plaintiff may bring his *habeas corpus* returnable in this court; and then the defendant cannot nonsuit the plaintiff, or be bailed but only by the court of *R. B.*"

Mr.

Mr. Cowper *contra*. A *habeas corpus* does not lie in this case. If it did, the original writs and bills of *Middlesex* in this court would be of little use. This is not the proper writ to remove a cause; but a *certiorari*: Suppose the defendant does not put in bail, the plaintiff can only have a *procedendo* to remove his own cause back again. The authorities cited do not apply: they only shew, that the plaintiff may have that kind of writ; but not to remove that particular suit.

Lord Mansfield. There does not appear to be any instance of it, and there seem to me to be strong reasons against it.

It was referred to the master to inquire into the practice of this and other courts.

Afterwards, in *Michaelmas* term, the master reported, that there was no instance of it in *this* court: That in the court of *Common Pleas* some few such writs had issued; but he understood from Mr. *Fothergill* the oldest secondary there, they had not been litigated; and ought not, in his opinion, to have issued. That in *London*, it is the practice for the plaintiff to be at liberty to remove the cause to the mayor's court, from the sheriff's court; but that the *custody* was *not changed*; the *plaint* only being removed by the *levatur*. He added, that the defendant might in the court below, by a summons, oblige the plaintiff below to proceed, or be non-prossed with costs; but if he was removed into the custody of the marshal he would have no method to compel the plaintiff to proceed here, or to obtain his costs below. Whereupon the court ordered the rule for quashing the writ to be made absolute.

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Nov. 26.

HARMAN and others assignees of FORDYCE *versus* FISHAR.

Tuesday,
June 14th.

THIS was an action of *trover*, brought by the assignees of *Fordyce* against the defendant, to recover two promissory notes. At the trial a verdict was found for the plaintiffs, subject to the opinion of the court upon the following case.

That the defendant *Fishar* was a creditor of the partnership of *Fordyce* and *Co.* and on various occasions had done them many acts of friendship: and being already a creditor for 1,300 *l.* shew him that preference which he conceives is his due. This is done without the privity of *F.* and followed by an act of bankruptcy before the notes could possibly be delivered. *Per. Cur.* The essential motive being to give a PREFERENCE and the act itself incomplete, is clearly void, though in favour of a very meritorious creditor.

A trader, in contemplation of absconding, incloses certain bills to *F.* a particular creditor, in discharge of his debt; saying, he has the honour to

1774. upon the 6th of *June* 1772, paid into the shop of *Fordyce* and *Co.* as bankers, the further sum of 7000 *l.* and had it written in his book according to the usual course; which sum he had borrowed for the purpose of accommodating the shop during the holidays; and at the time the money was paid in, he ordered the person who paid it to tell them he should not draw the money out before the *Friday* following, which they were told accordingly,

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On the 9th of *June*, *Fordyce* set up all night settling his books and affairs in contemplation of absconding; and being possessed in his own separate right of the two notes described in the declaration, about five o'clock in the morning he inclosed them in a letter to Mr. *Fisbar* as follows: to Mr. *Fisbar*.—
“ Mr. *Fordyce* conceiving that the money lodged by Mr. *Fisbar* with his house on *Saturday* last, was a sum, about which perhaps even some pains have been taken to place it there, he has the honour to shew him that preference which he conceives is certainly his due.”

5,500 *l.* *Collins* and *Co.* 3d *July*.
11,702 *l.* 18s. 4d. *T. Wm. Jolly*, 20th *June*.

That *Fordyce* delivered the letter and notes to Mr. *Harrison* his clerk, with directions to carry them to Mr. *Fisbar*'s office, and give them to him.—About six o'clock the same morning *Fordyce* absconded and went to *France*.—At half an hour after eleven o'clock the same morning, a commission of bankruptcy duly issued against him.—*Harrison* about ten o'clock the same day called at the defendant's office: not finding him at home he returned again about twelve: but it being holiday time the office was shut up.—That, on *Thursday* the 11th, *Harrison* delivered the letter with the notes to Mr. *James* one of the partners of *Fordyce*, who sent for the defendant; when Mr. *James*, in the presence of the defendant and Mr. *Bellamy*, opened the said letter and delivered it with the notes to the defendant; who having read the same to the company present, took them away with him: that they remain in his possession, and that he refused to deliver them up. That *Fordyce* was indebted to the partnership in a larger sum than the amount of the notes in question.

The question for the opinion of the court upon this state of the case was; “ Whether the plaintiffs are entitled to recover in this action?”

This

This case was twice argued: first, in *Easter* term * by Mr. *Buller* for the plaintiffs and Mr. *Alleyne* for the defendant; and now in this term by Mr. *Lee* for the plaintiffs, and Mr. *Dunning* for the defendant.

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* April 29th.

On the part of the plaintiffs it was insisted, that under the circumstances of this case it was not competent to Mr. *Fordyce* to give this *preference* to the defendant. For, however, fair the transaction might be as between the parties; yet a trader, in contemplation of an act of bankruptcy, cannot give a preference to any particular person: because, it is a fraud upon the rest of the creditors, and against the general spirit of the bankrupt laws. This principle is fully settled and established in the case of *Worseley v. Demattos*, 1 *Bur.* 474. *et seq.* where the court held, that an assignment of all the bankrupt's effects, tho' a fair transaction between the parties, and for a good and valuable consideration, was nevertheless fraudulent in respect of the other creditors: the object aimed at, being to give a preference which was unlawful.

The case of *Small v. Oudley*, cited in the case just mentioned, may be thought to be an authority the other way: but there no fraud was meant against the creditors: on the contrary, the court said the whole transaction was beneficial to them; and the only person defrauded was *Small*. Besides, the only point decided in that case was, that a deed cannot be fraudulent in equity which would not amount to an act of bankruptcy at law.

But the present case is clearly distinguishable from *Small v. Oudley*: For here the defendant knew the shop to be in a depending state when he advanced the money: the repayment was voluntary, without the knowledge of the defendant, in the very moment of absolute bankruptcy, and with a professed view of giving an undue preference. An additional circumstance is, that the notes were not delivered till after a clear act of bankruptcy was actually committed: For want, therefore, of the defendant's *assent*, the transaction was not complete, which alone is sufficient to render the payment void. There are two cases in which this objection made a principal ground in the determination the court gave. *Hague v. Rolleston*, *Hil.* 8 *Geo.* 3. (since reported in 4 *Bur.* 2174) and *Alderson v. Temple*, since reported likewise 4 *Bur.* 2238 *Pasch.* 8 *Geo.* 3. But the reasoning and principles laid down in the latter case upon the question of

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preference are decisive of the present. Mr. *Buller* stated the opinion of the court at large, *quod vide.* 4 *Bur.* 2239.

This doctrine is confirmed and strengthened by a case of very late date. *Linton v. Bartlett*, Hil. 10 Geo. 3. C. B. MSS.

The case was thus: The plaintiff's brother carried on his trade in two separate shops, an upper and an under one: being indebted to his brother, upon the 3d of *August* he assigned over to him such of his goods as were in his upper shop, being one third part only of his stock in trade: and this he did for the purpose of giving his brother a preference: the question was, Whether this assignment was an act of bankruptcy? *Per curiam*, "This is a very plain case: the deed and the transaction may have been very fair as between the parties; but in all these cases the object to be attended to is, *quo animo* the transaction is done. Now the single question is, Whether a man shall be allowed to commit a fraud upon the whole system of the laws concerning bankrupts, by giving a preference to one creditor in prejudice to the rest? clearly he shall not: and here it being by deed, it is in itself an act of bankruptcy. The great criterion is, Whether the act be done in contemplation of becoming a bankrupt."

This is a decision expressly upon the point of preference in contemplation of bankruptcy; and no inconvenience can arise from fixing that as the moment when the curtain should drop. Here it is expressly found that the notes were sent in contemplation of committing an act of bankruptcy, and professedly with a view to give the defendant a preference. The act, therefore, is void, and the plaintiffs well entitled to recover.

Mr. *Dunning* and Mr. *Alleyne* for the defendant.

Two questions arise in this case, *First*, Whether it is competent in law for a trader, in contemplation of an act of bankruptcy, to give a preference under any circumstances?

Secondly, If there be any case in which that preference may be given, Whether this is one of those cases?

With respect to the first, It has been settled that a trader at the eve of a bankruptcy may do every thing that he might have done at any period antecedent to that time; but it has never been established that a trader shall at *no* time give a preference to a *bonâ fide* creditor. On the contrary, the case of *Small v. Oudley* 2 P. Wms. 427. is an authority expressly the other way. The circumstances were very like the present. On the 21st of *September* 1720, *Small* to accommodate his friends D. and J. Nor-

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court transferred 500 *l.* *South-sea* stock to them upon condition it should be returned in ten days. Upon the 29th they made an assignment of *part* of their effects to *Small* as a security for transferring 500 *l.* *South-sea* stock, reciting the truth of the case and the next day absconded.—Sir *Joseph Jekyl* was clearly of opinion that this assignment was good: “that there may be a just reason for a sinking trader to give a preference to one creditor before another; to one that has been a faithful friend, and for a just debt lent to him in extremity; when the rest of his debts might be due from him as a dealer in trade, wherein his creditors may have been gainers: whereas the other may not only be a just debt, but all that such creditor has in the world to subsist upon: in this case, and so circumstanced, the trader honestly may, nay ought to give a preference.” He says further, “the time of the assignment is not material, provided it be before the bankruptcy: but the justness of the debt is very material; and the circumstance of the non-privity of the creditor to the assignment was very much in his favour.”

It is plain, therefore, from this case, that antecedent to an act of bankruptcy actually committed, there may exist a case in which by law it is permitted to a trader to give a preference. The observation made by Lord *Mansfield* upon this case of *Small v. Oudley* in the decision of *Worsley v. De Mattos* tends to explain that the ground of the opinion was right. For, his Lordship said, “this case was very particular: the fraud was upon *Small*, and not upon the creditors: His stock was to be replaced in a week or ten days at furthest: 1,800 *l.* of *Small*’s money went to the creditors, and this security amounted but to 300 *l.* So that the whole transaction was beneficial to the creditors.” Now every syllable and every circumstance upon which Sir *Joseph Jekyl* founded his opinion in that case, is not only applicable to, but actually to be found in the present.

The case of *Linton v. Bartlett* is inapplicable to this case: for the ground of that decision was that the assignment was an act of bankruptcy itself, and, being of *all* the goods in *that* shop, was within the same mischief as if it had been an assignment of the goods in *both*. It has been insisted that no inconvenience can arise if the line were to be drawn at the beginning of an insolvency. That is not so; for then all the creditors subsequent to the time when the court determines that the line of distribution should be drawn, must be involved in the wreck. The contemplation of becoming bankrupt, is equally difficult to ascertain:

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certain: but neither the point of insolvency nor the resolution to become bankrupt is the period of bankruptcy; nor can the contemplation of bankruptcy be the true line to be drawn: for each is so indefinite and uncertain, that the rule in either case would tend to endless litigation. It were to be wished, therefore, that the court would settle the rule of preference according to the honesty or dishonesty of the transaction.

In *Alderson v. Temple*, Mr. Justice Yates said, there is no doubt but that an act of this sort may be done on the eve of a bankruptcy under fair and honest circumstances; and that in *Small v. Oudley* the justice of the case required it. With respect to the act being incomplete for want of the defendant's assent, in *Atkins v. Barwick*, 1 Str. 165. the assent was subsequent to the act of bankruptcy: and the only question was, Whether a subsequent dissent was necessary to divest the property.—The court held, that delivery vests property unless divested by a subsequent dissent: and if founded upon good consideration is not countermandable. Here the delivery was unquestionably upon good consideration; and, therefore, as to the point of non-privity and assent, the authority is decisive.

The second question is, Whether this is a case in which a preference may be given? And this, we have seen, depends upon the honesty of the transaction.

Now, the purpose for which Mr. *Fisbar* advanced this money was meritorious and friendly in the highest degree: the use to which Mr. *Fordyce* applied it, namely, to lessen the partnership debt, was just and honest: but his distresses were such as defeated the object, and, therefore, what could be more fair, what more reasonable, what more distant from fraud than to return it. When returned, the creditors were precisely in the same situation as they would have been in, if it had never been advanced: and no doubt in itself the loan of the money was as friendly and in its consequences might have been as beneficial to them as it was intended to be to Mr. *Fordyce*.

LORD MANSFIELD, after stating the case delivered his opinion as follows:

The defendant Mr. *Fisbar* is certainly a very meritorious creditor of Mr. *Fordyce*; and in this last transaction did him a very great act of friendship. I have, therefore, been very sorry, as far as one can be said to be sorry in the administration of justice, that I could not see in this case any circumstances which could give rise to a question: for they are so very particular as not to lay the least foundation for one.

The

The question is, "Whether the plaintiffs are entitled to recover in this action?" which depends on this: Whether the property of the two notes was duly and regularly transferred before the act of bankruptcy? I say duly and regularly, because that excludes fraud.

Legal preference is where the property is duly and regularly transferred;

There has been much argument upon a general question, "Whether a trader in contemplation of an act of bankruptcy can give a preference to a *bona fide* creditor?" Perhaps the stating it as a general question involves a great impropriety: because no trader can do an act of fraud, contrary to the spirit of the bankrupt laws, and to the injury of his creditors. He cannot assign his effects to all his *other* creditors in exclusion of one whom he thinks dishonest or unjust: nor even to be equally divided amongst all his creditors; because he cannot take his estate out of that management which the law puts it into. If any act of this sort is done by deed, it is not only void, but in itself an act of bankruptcy from the date of the deed. If without deed, it is void in respect of those whom it prejudices.

But all questions of preference turn upon the action being complete before an act of bankruptcy committed: for then the property is transferred; otherwise, an act of bankruptcy intervening vests the property in the hands and disposal of the law.

and the transfer itself complete before an act of bankruptcy.

In the case of *Worfeley v. De Mattos*, whatever the court might think of the case of *Small v. Oudley*, there was no intention to lay it down that the determination of that case was wrong at that time. But no case ever came before us where we were warranted to say, that no case can exist of a legal preference. For if a man were to make a payment but the evening before he becomes bankrupt, independent of the act of parliament and in a course of dealing and trade, it would be good: or suppose legal diligence used by a creditor, and an execution or *ca. sa.* is in the house, and under terror of that he makes an assignment and delivery of his effects, it would be valid; the object not being to give a preference, but to deliver himself.—In *Cock v. Goodfellow* the act done was fair: it was done several months previous to the act of bankruptcy, and was no more than what the court of Chancery would have compelled the party to do. Where an act is done that is right to be done, and the single motive is not to give an unjust preference, the creditor will have a preference.

As where a payment is made by a trader, in the ordinary course of dealing, or enforced by legal process, though but the evening before he becomes bankrupt.

In *Small v. Oudley* upon a *Stipulation* to replace so much stock the day, agreed upon was *past*; the estate had had the benefit of the

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the solemn agreement, and the bankrupts gave a security for part of the debt only: a distinction was likewise taken because the security was upon their effects in a separate trade. That was a very favourable case: but I think it extremely shaken by the case of *Linton v. Bartlett* in the *Common Pleas*, which goes further than any other: For that case has determined that though the act be complete, yet if the mere and sole motive of the trader was to give a preference, it shall be void; and if by deed, is in itself an act of bankruptcy. In that case the money was advanced by the brother from motives of friendship and without interest. Possession of the goods was delivered instantly upon the assignment being made; and a clear act of ownership exercised by the brother, by his exposing them to sale, and carrying on the trade: nor had he the least knowledge or suspicion of the insolvency. But the material circumstances which made that a fraudulent act, are these: The brother did not arrest, or threaten, or even call upon the bankrupt for the money: But the bankrupt of his own *voluntary* act gave him the assignment. With what intent? Why, to give him a preference. The goods assigned were not more than one-third of his effects. Upon what then was the opinion of the court founded? Not upon one-third being the same as an assignment of all his effects; but upon the trader's giving a preference; and upon his sole motive being to do so. If he can give it to one, he can give it to another; which would establish this principle, that a bankrupt may apportion his estate amongst his different creditors as he thinks proper. That case goes further than any former decision. It had before been held in *Worfeley v. De Mattos* that an assignment of *all* was a clear act of bankruptcy, and an exception of *part*, if colourable or fraudulent, will not take it out of the general rule.

But the present case affords no circumstances that can give rise to a question. A trader at five o'clock in the morning, just going to commit an act of bankruptcy, orders his servant to take certain bills to a creditor in discharge of a debt: pursuant to no *contract*: in performance of no obligation; in no course of dealing; without the privity of the creditor, or call on his part for the money, and without a possibility of the notes being delivered before an act of bankruptcy was committed. This is an order how his effects shall be apportioned after his bankruptcy. He delivers the letter to his own servant, and might have countermanded it: here it falls in with the case of *Temple v. Alder-*

son,

fen, and *Hague v. Rolleston*: The act was not complete; and therefore the act of bankruptcy revoked it. Suppose the drawers had been insolvent, was Mr. *Fisbar* bound to take the notes in satisfaction of his debt? Besides, the amount of the notes exceeded the debt by several hundred pounds. But what is the nature of the transaction upon the face of the letter? It is in terms a declaration that he means to give a *preference*. This the law does not allow: and if it had been by deed it would itself have been an act of bankruptcy. But it is much stronger where the trader mentions that to be his *sole* motive; and where the act cannot be completed till after an act of bankruptcy actually committed.

The three other judges were of the same opinion.

Lord *Mansfield* added, that if a preference were only consequential, the case might be different: as if a payment were made or an act done in pursuance of a prior agreement. His Lordship further observed that with respect to the case of *Aikyns v. Earwick*, 1 *Strange* 165. the judgment seemed to be right, but the reasons wrong. The true ground was, that the trader very honestly *refused to accept* the goods, and *returned* them.

HUGHES *versus* RICHMAN.

Same day.

IN covenant the plaintiff declared as assignee of one *Clarke*, for that the defendant, under an indenture of lease from the said *Clarke*, had covenanted, *inter alia*, "that he the said *John Richman* would permit and suffer the said *Josiah Clarke*, his heirs, nominees, and assigns, or his or their next tenant or tenants, to enter into and upon all or any part of the demised premises, which in the last year of the said demise should be sown with barley or oats, and then and there to sow along with the barley and oats of the said *John*, so much clover and grass seeds in such manner as the said *Clarke*, his heirs, &c. should think fit." The breach assigned was, "that the defendant in the last year of the term, did sow twenty acres with *barley*, and twenty acres with oats, *without giving notice* to the plaintiff; by which he was prevented from sowing the clover and grass seeds." The defendant pleaded, "that he did not *prevent* the plaintiff from sowing as much clover and grass seeds as he thought fit and convenient." The plaintiff demurred, and assigned for special causes of demurrer, 1st, That defendant

COVENANT "to permit the plaintiff in the last year of the term to sow clover among defendant's barley." BREACH ASSIGNED was, that the defendant sowed, &c. without giving the plaintiff notice.

PLEA, that the defendant did not prevent, and upon demurrer adjudged a good plea.

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the defendant by his plea had put in issue a matter of *inference* from the fact before alleged. 2dly, That he had offered to put in issue a matter not properly issuable. 3dly. He had not by his plea denied, confessed, or avoided the substantial matter.

Mr. *Baldwin* for the plaintiff. Covenants depend so much upon the nature of the particular contract that there is no case in point; but I contend that the defendant ought to have given notice to the plaintiff before he sowed the land with barley and oats, in order that he might sow grass seed at the same time agreeably to the terms of the covenant: for it is a general rule, that wherever the matter lies more in the conscience of one party than of another, such party ought to give the other notice. *Hardres* 42. Here the plaintiff could not be apprised of the intention of the defendant to sow, or even of the fact of his having sown barley and oats, without previous notice; and therefore it was incumbent upon him to give such notice.

Mr. *Buller* for the defendant. The plea is good in substance and in form. For 1st. In a declaration in covenant, the breach may be assigned as generally as the covenant, even though it amount to a negative pregnant. *Cro. Jac.* 170-304. 3 *Mod.* 69. 2dly. The defendant need not be more particular in his plea, than the plaintiff in his declaration, and he may elect to pursue either the words of the breach assigned, or the words of the covenant itself. If he answer the former, it is sufficient, because then there can be no cause of action; if the latter, it is an answer to all the charge alleged. Here the covenant is, "to permit and suffer," and the breach assigned is, "that the defendant prevented by not giving notice." The plea is, "that he did not prevent the plaintiff from sowing the grass seed." The question is, Whether notice is necessary? I contend it was not; for it is not a general rule that where things lie more in the knowledge of one party than of the other, that that person is bound to give notice. On the contrary, if there had been an express covenant in this case, on the part of the plaintiff to sow clover, &c. when the defendant sowed barley, &c. it would have been incumbent on the plaintiff to have taken notice at his peril, when the defendant sowed barley. If he is not bound, therefore, to give notice, where the omitting to do so would create a breach in the plaintiff, much less is he obliged where it is to excuse a breach on his own part. *Cro. Jac.* 102. *Bulstrode* 254-5. *Jenkins* 337. *Cro. Jac.* 475. 1 *Roll. Abr.* 464.

Again,

Again, this covenant is merely negative and passive; and therefore to constitute a breach some act must be done: a non-feasance only is not sufficient. 1. *Roll. Abr.* 425. pl. 45. 1 *Roll.* 430. pl. 16. 3 *Leon.* 38. *Lastly*, If a breach at all, it is a constructive breach: for admitting it to have been in the intention of the parties that notice should be given, yet no notice is expressed in terms which it ought to have been. It is therefore *casus omisus* in the covenant, which the court will not supply. *Sty.* 12.

Lord Mansfield. Stript of the authorities that have been cited, this is a very plain case. The covenant makes no mention at all about any notice to be given. The breach assigned is, the not permitting the plaintiff to sow grass seed. The single question is, whether the defendant did or did not prevent him? If he had refused to give notice, or had given a wrong notice, it might have been a breach: but here it appears that he has done nothing to prevent him or the contrary. Therefore there can be no breach.

Willes Justice concurred. *Asbhurst Justice*—The plaintiff is the party for whose benefit the covenant was intended; therefore he ought to have used due diligence. *Per Curiam*, Judgment for the defendant.

1774.

HUGHES
versus
RICHMAN.

MARDER *versus* COX.

Wednesday,
June 15th.

BY an order of *Nisi Prius* referring this case to arbitration, it was ordered, "that all matters in difference between the parties, together with the costs of this action and reference, be referred to the award of, &c." The arbitrator as to the costs awarded as follows: "That the defendant shall pay to the plaintiff his full costs and charges of this action such costs to be taxed as between attorney and client by the proper officer, &c."

Costs of suit on a rule of reference, are common costs. Vide S. P. determined this same term in C. B. in the case of Barker v. Timson. 2 Blackstone Rep. 953.

Mr. Dunning moved to set aside this award, because the arbitrator had exceeded his power in directing the costs to be paid as between attorney and client: for the intent of the reference was merely to put the party who should be thought right, in the same situation as if he had had a verdict; in which case he could only have received costs taxed in the ordinary course between party and party.

Upon

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*In *Barker*
v. Timson
there was
the like

rule: But the motion in that case was only to set aside *so much* of the award as directed the costs to be paid as between attorney and client.

Upon shewing cause, the court held the award wrong upon this objection; for the words of the reference clearly meant costs in a technical sense, which are *legal* costs: but as to *costs* they held it good; and therefore ordered, * that so much of the award as directed the master to tax the costs as between attorney and client, should be set aside, and the rest should stand.

Same day.

Anonymous.

UPON a rule to shew cause why the proceedings in this ejectment should not be staid till a sufficient plaintiff was found, the lessor of the plaintiff being an infant; Mr. *Morgan* shewed for cause, that no application had been made to know if there was a real and substantial plaintiff; and it being stated by affidavit that the guardian had undertaken to pay the costs, if the suit should be determined against the infant, the court discharged the rule with costs.

Thursday,
June 16th.

Anonymous.

In an action upon the judgment though for above 10*l.* the defendant shall not be held to special bail, if the original demand was under that sum.

UPON a rule to shew cause why upon filing common bail a *supersedeas* should not issue as to this action to discharge the defendant out of gaol; Mr. *Cowper* shewed for cause that though the debt was originally under 10 *l.* yet after judgment obtained, and *costs* taxed, the whole sum amounted to 17 *l.*; and that upon a writ of execution being sued out, the defendant, in consideration that the plaintiff would stay the execution at that time, undertook and promised to pay the debt and costs. That several applications had been since made to the defendant for payment without effect, and, therefore, he was now held to bail upon his new *assumpsit* for the 17 *l.*

Wilkes Justice mentioned the case of *Palmer v. Nedham* 3 Burr. 1389. where the plaintiff, whose original demand was only 3 *l.* 13 *s.* 6 *d.* having obtained judgment, brought an action of debt thereupon for the debt and costs, amounting in the whole to above 10 *l.* and held the defendant to special bail. But upon shewing cause why common bail should not be accepted, and the bail-piece discharged, the court ordered it accordingly.

Lord MANSFIELD. This is a new species of action, and an attempt to turn a judgment debt into a debt upon simple contract. If the undertaking had been by a third person in consequence of the forbearance, it would have been a good ground of *assumpsit* against such third person. But here the promise is by the defendant himself to pay a debt to which he was before liable upon record: for by the judgment he is liable to the costs as well as to the debt. And, therefore, I am of opinion that such promise is no ground upon which to raise an *assumpsit*.

Asbburst Justice. I am of the same opinion. This promise is no waiver or extinguishment of the judgment debt; but it still remains a lien upon the land.

Rule made absolute.

1774.

Promise by the defendant to pay a judgment debt obtained against him in consideration that the plaintiff would stay execution thereon, is no ground to raise an *assumpsit*. Otherwise, if the promise be by a third person.

DOE on the demise of ROGERS *versus* MEARS.

Friday,
June 17th

IN ejectment brought to recover two rectories, upon a case reserved for the opinion of the court, the facts were as follow. "That upon the 9th of May, 1766, the rector, in pursuance of an agreement, and in consideration of 360 *l.* demised the rectories in question to the lessor of the plaintiff for 99 years, if the rector should so long live, for the purpose of securing to the lessor of the plaintiff an annuity of 60 *l.* per annum, with a power of entry, and likewise a power of distress and sequestration if the annuity were in arrear. That the annuity was in arrear, that the rector absconded in December 1770, and had not been resident since." No witness was called on the part of the defendant, but it was admitted that he was in possession under a sequestration. A verdict was found for the plaintiff, subject to the opinion of the court upon the following question; "Whether the deed and the lease under which the plaintiff made his title was void by the statute 13 *El. c. 20*?"

A sequestration upon a *sf. fa.* of a benefice with cure, is no excuse for the non-residence of the incumbent: and a lease thereof made by him, is, on account of such absence, void by the stat. 13 *Eliz. c. 20. sf. 1.*

Mr. *Whitchurch* for the plaintiff. The object of the stat. 13 *Eliz. c. 20.* was to prevent the corrupt transfer of ecclesiastical benefices only: and being a penal statute ought to be construed strictly. But here no proof is stated of any corrupt agreement, therefore it is not within the penalty of the statute. —2dly, The absconding in this case is not an absence within the purview of the statute, which clearly meant a *voluntary* and wilful

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Dox
versus
MEARS.

non-residence, not a compulsory absence as in this case, in consequence of the defendant's sequestration. The words of the stat. 21 H. 8. c. 13. sect. 26. against non-residence and the cases decided upon it support this construction, "every spiritual person " &c. who shall wilfully absent himself." *Moore* 448. 6 Rep. 21. b.

Mr. *Murphy* for the plaintiff cited *Bunb.* 210, 211.

Lord MANSFIELD. This is a very clear case. A sequestration under a *fieri facias* is no impediment or prevention to the serving a cure; and therefore the non-residence is a clear avoidance of the lease. *Per curiam*. Let a nonsuit be entered and the postea be delivered to the defendant.

Same day.

HEYLYN versus HEYLYN.

One, having made his will, and devised all his freehold and copyhold lands to a number of uses, afterwards purchases other copyhold lands which he surrenders thus:

"To the uses
"DECLAR-
"ED or to
"be declared
"in and by
"his last
"will and
"testa-
"ment."

This amounts to a republication; and the newly purchased copyhold lands shall pass to the same uses as the testator's copyhold lands devised by his will.

THIS was a case from Chancery for the opinion of this court, in substance as follows:

That *John Heylyn* being seised in fee of certain freehold lands called *Hanchet-Hall*, part thereof situate in the county of *Essex*, and other part thereof in the county of *Cambridge*, and being likewise seised of certain other lands called *Higgon's*, partly freehold and partly copyhold in the county of *Essex*, duly made and published his last will bearing date the 13th of March 1732, and thereby devised ALL his messuages, lands, tenements and hereditaments, as well freehold as copyhold, situate, lying and being in the counties of *Suffolk*, *Essex*, and *Cambridge*, or either of them, to *Susannah Helen* his wife for life; and after her decease to a number of uses: and devised All the rest and residue of his real and personal estate to his wife, her heirs, executors and administrators, and appointed her his sole executrix.

That the testator at the time of making his will was mortgagee out of possession of three fifth parts of certain copyhold premises holden of the manor of *Heddingham Upland* in the county of *Essex*, which he afterwards purchased and was admitted to on the 20th of October 1735, and in the same year purchased one other fifth part of the same premises; all of which he surrendered thus: "To the uses, intents and purposes, declared " or to be declared in and by his last will and testament."

In the year 1736, the testator directed a 50*l.* legacy to be struck out of his will, and subscribed the following memorandum in the presence of two witnesses: September 31st 1736. "The 50*l.* " legacy to the poor of the parish of *Wrexham*, scratched out as " above, was done in his presence and by his immediate order, he

"having paid it himself." That in the year 1737, the testator *John Heylyn* died seised of the said lands called *Hanchet-Hall* and *Higgons*, and also of the four fifth parts of the said copyhold lands holden of the manor of *Heddingham Upland* in the county of *Essex*, without revoking or altering his said will, or making any codicil thereto, except the codicil or testamentary declaration above-mentioned.

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The question stated for the opinion of the court was, "Whether the copyhold lands to which the testator *John Heylyn* was admitted the 20th of *October* 1735, and surrendered to the use of his will, or any part thereof, were subject to any of the uses mentioned in his will dated the 13th day of *March* 1732, and which of them?"

Mr. *Mansfield* for the plaintiff. The copyhold lands did not pass by this will. 1st. Because no after purchased lands can pass by a will already made, however general or extensive the words of such will may be. 1 *Salk.* 237. *Den* on the demise of *Harris v. Cutler*, *Tr. 10 Geo. 3. B. R.* 2dly, They clearly cannot pass by the expressions used in this will and surrender; because the surrender is merely in the common form, to the uses declared or to be declared, &c. But no uses were declared of these lands at the time of their being purchased, nor is there any thing in the surrender which distinguishes to which of the uses in the will they should operate; consequently they descend to the heir at law as being undisposed of.

Mr. *Dunning contra.* The copyhold lands in question did pass by this will. The terms of this surrender are framed so as to relate either to a will in being, or to any future will the testator might be supposed to make. But the rule as laid down respecting after-purchased lands is not universally true; for if a man purchase freehold or copyhold lands, and by any disposition he may chuse to make of them recognizes an intention expressed in a former instrument, such recognition will guide the disposal of them. The case of *Harris v. Cutler* is in favour of the defendants. For there Lord *Mansfield* said, that a surrender of lands after-purchased might be so penned as to refer to a disposition already made: and the ground of the decision was, that the words of surrender were to such uses as *I. S.* shall declare, &c. Here the surrender is so penned as to relate to the will of 1732, for it is to the uses declared, &c. But if it were doubtful, the circumstance of erasing the legacy of 50*l.* which was subsequent to the surrender, in itself amounts to a republication of the will; for it is strong evidence to shew that

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he meant the rest of his will should remain good, and the slightest proof is sufficient to make a republication, which is always favoured in law. 1 *Vern.* 330. 1 *Roll. Abr.* 617.

Lord MANSFIELD. I never had the least particle of doubt in this case: the stating the nature of a republication will go a great way in the construction of this surrender. When a man republishes his will, the effect is, that the terms and words of the will should be construed to speak with regard to the property he is seised of at the date of the republication, just the same as if he had had such additional property at the time of making his will. Therefore, if one devises lands by the name of *B. C.* and *D.* and purchases new lands and republishes his will; the republication does not concern such new lands, because the will speaks only of the particular lands *B. C.* and *D.* But if the testator in his will says, I give *all* my real estate, a republication will affect such newly purchased lands, because it is then the same as if the testator had made a new will. Apply this rule to the case of a surrender, and I am of opinion that the surrenderor may express himself so as to make it relate to a will actually made; and that the copyhold lands so surrendered will pass by it. Suppose a testator seised of copyhold lands makes his will without a surrender; if he afterwards surrender them to the use of his will, such surrender will clearly make his will good, and is effectual to pass them: because it only obviates the mode and form of conveyance.

What has the testator done here? having made his will and declared his lands to uses, he surrenders his newly purchased copyhold lands, to the uses, intents and purposes, declared or to be declared in his will; it is precisely the same thing as if he had said, and whereas I have made a will so and so, and devised all my lands to *I. S.* to such and such uses, I mean these newly purchased lands should pass to the same uses. I cannot possibly make a doubt as to the construction: and there was no occasion to strike out the legacy of 50 *l.* unless he intended that particular part of his will should be cancelled, and the rest stand.

Lord MANSFIELD added,—I should have observed upon the inaccuracy of reporters, who are very apt to say that a thing is so and so in *Equity*. Now there is no republication in equity that is not so in law. But the expression *in equity* is very likely to mislead students, and make them imagine there is a distinction.

The court certified their opinion to the court of Chancery as follows:

Having heard counsel on both sides and considered this case, we are of opinion that the surrender of *John Heylyn* the grandfather, bearing date 20th *October* 1735, does, by express reference to the uses declared by his will, adopt and apply the words of the will to these copyhold lands, as if the testator had been seised thereof at the time of making the said will; and, therefore, they are subject to the same uses to which all the testator's copyhold lands in the county of *Essex* are devised by his will.

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versus
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RIDOUT and Another, Assignees, *versus* BROUGH.

IN *assumpsit* the declaration consisted of five counts. 1st, For money had and received by the defendant *since* the bankruptcy to the use of the assignees. The 2d, 3d, and 4th were for money paid, &c. money lent, &c. and work and labour done by the *bankrupt* before the bankruptcy and *assumpsit* to the assignees. 5th. An account stated with the plaintiffs of money due to them as assignees.

The Statutes of set-off extend to assignees under a commission of bankruptcy.

The defendant pleaded. 1st, *Non assumpsit*, on which issue was joined. 2d, A plea of set-off of 869 *l.* to the *whole* declaration, for a judgment obtained against the bankrupt for money lent and advanced, money had and received, *before* the bankruptcy. 3d, Another plea of set-off for money lent and advanced, money laid out and expended, and goods sold and delivered to the plaintiffs as assignees, *since* the bankruptcy, and an account stated with them. To the 2d and 3d plea the plaintiffs demurred, and the defendant joined in demurrer.

Mr. *Cowper* (who argued from Mr. *Buller's* notes in his absence) in support of the demurrer. 1st, Both pleas are bad. 2dly. The statutes of set-off do not extend in any case to assignees of a bankrupt.

1st Point. Each plea goes to the *whole* declaration, and if bad as to any one count, they are bad for the whole. 1 *Saunders*, 28. Lord *Manchester v. Vale*. 1 *Lev.* 48. *Webb v. Martin*. In this last case, in *assumpsit* on several promises, it was held by the court on demurrer, that if the defendant plead the statute of limitation generally to the whole declaration, and the plea is ill as to one count, it is ill for the whole. So if an executor plead several judgments, and the plea is bad as to one judgment, it is bad in respect of all. 2 *Saund.* 50. Here the first count is for money had and received *since* the bankruptcy to the use of the assignees. Nei-

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versus
BROUGH.

ther of the pleas is good as to this count. For if the defendant should be admitted to set off a debt due *before* the bankruptcy against money which he received *since*, there would be an end of the bankrupt laws. Because then every man who was the creditor of a bankrupt, would by indemnities or some other trick, after an act of bankruptcy committed, get money into his hands, and by that means pay himself in preference to other creditors.

The other counts in the declaration are for money due *to* the bankrupt, *before* the bankruptcy. The last plea is wholly for money due to the *defendant*, *since* the bankruptcy from the *assignees*, therefore, that the plea is for a demand on different persons from him, to whom the money was due, which is the ground of action; for the demand set off in this plea never was a debt from the bankrupt, nor could an action have been brought against the bankrupt for it; therefore the debts are not mutual. All the debts in the declaration but the first were due to the bankrupt, none in this plea were due from him.

But further, the subject matter of the last plea is such, as cannot exist in point of law; for it supposes debts to have been contracted by the assignees in their political character, as such; namely, for goods sold and delivered, money lent, &c. &c. to them as *assignees*. Taking it as a debt due from them in their private capacities, there cannot be the least colour for the set-off, for that would be setting off the debt of *A.* against the debt of *B.*; and in their political capacities they have not the power or ability of contracting such debts to charge the bankrupt's estate. Therefore, on these special grounds, applicable to this particular point, both pleas are bad.

2d Point. Both pleas are likewise bad on the general principle of law, that the statutes of set-off do not extend in any case to assignees of bankrupts, and, therefore, are not tenable either on the stat. 2 *Geo.* 2. c. 22. or on the stat. 5 *Geo.* 2. c. 30.

First, Under the stat. 2 *Geo.* 2. no debt can be set off against another which is not mutual; and these debts never were mutual: for part of the plaintiff's demand is for a debt accruing since the bankruptcy, for which the bankrupt never could have had an action, and the first plea is for a demand due from the bankrupt. The other part of the plaintiff's demand is for money due to the bankrupt. The last plea is for a demand due from the assignees since the bankruptcy; and, therefore, if an action had been brought by the bankrupt for that part of the plaintiff's demand, the subject matter of this last plea never could have been set

up

up as a defence against it, for at that time this debt did not exist. Therefore these debts are not mutual.

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versus
BROUGH.

Secondly, Wherever there are mutual debts there must be mutual remedies; but in case of assignees there are not mutual remedies, for no action will lie against them. So determined in *Ryal and Larkin*, 1 *Wils.* 155. This case, according to another note, was considered both on the statute of set-off and on the stat. 5 *Geo.* 2. and it was expressly holden not to be within the statute of set-off, because the defendant could not have an action against the assignees.

Lastly, This set-off cannot be supported under the stat. 5 *Geo.* 2. for that statute expressly requires "that it shall be made appear to the commissioners, &c. and on it's being so made appear they or the assignees may state the account," &c. But to take advantage of this statute the party must conform to the provisions of it; that is, he must apply to the commissioners, and if they act improperly, he must appeal to the great seal. Besides in this case even the commissioners could not allow the set-off, for under this act there can be no set-off but where the debts are due before the bankruptcy. But here part of the plaintiff's demand accrued since the bankruptcy, and all the demand comprised in the last plea likewise arose since the bankruptcy. Therefore, whether considered as a general question of law on the stat. 2 *Geo.* 2. or on the stat. 5 *Geo.* 2. or on the particular circumstances of this case, and the impropriety of each plea with respect to the different parts of the declaration, these pleas cannot be supported.

Mr. *Withers*, *contra*, for the defendant, as to the second point, cited 2 *Vern.* 117. *Chapman v. Derby*, and 2 *Kelynge* 24. pl. 19. *Ex parte Riley*.

The Court were clearly of opinion with him on this point, that the defendant might set off a debt due to him from the bankrupt; for the assignees are the bankrupt; and seemed to impeach the decision in 1 *Wils.* 155. "that the statutes of set-off do not extend to assignees under a commission of bankruptcy," as against the general principles of law, justice, and good sense. But they were equally clear on the first point, that the last plea was bad, and the second badly pleaded, being to the whole declaration. But they gave the defendant leave to amend his plea, upon payment of costs and other terms.

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Same day.

REX *versus* STOKES.

One, in custody upon an attachment for non payment of costs under stat. 5 & 6 W. & M. c. 11. sect. 3. may be discharged under the lords' act, 32 Geo. 2. c. 28. sect. 13.

THE defendant had been convicted of an assault, and sentenced to four months imprisonment which were expired: but he was continued in custody on an attachment for non payment of costs taxed, pursuant to a recognizance entered into by him on his removal of the indictment from the quarter sessions.

Mr. *Lucas* had moved for his being discharged under the stat. 32 Geo. 2. c. 28. sect. 13. commonly called the lords' act. Mr. *Couper* now shewed for cause that this statute does not relate to costs accrued in *criminal* cases. Mr. *Lucas* in support of the rule insisted that the defendant was in execution, and therefore within the stat. 32 Geo. 2. c. 28. sect. 13. the words of which are, that "if any person, &c. shall be charged in execution for any sum or sums not exceeding in the whole 100*l.* &c." The Court inclined to think this case was not within the act, and the defendant was remanded.—But the next day Mr. Justice *Aston* asked Mr. *Lucas*, if he knew of any case where a person had been discharged out of custody on the lords' act, upon an attachment in a *civil* suit; and mentioned the case of *Rex v. Stokes, Mich. 23 Geo. 2. B. R.* which was an application by the defendant, who was in custody upon an attachment for a rescous upon an execution, to be discharged under the act of *indemnity* 20 Geo. 2. c. 52. Upon shewing cause it was objected that the statute in sect. 26. contained an exception as to all persons guilty of *contempts*. But *Lee* Chief Justice there said, "it was not a contempt within the provision of that section, the contempts there excepted being confined to cases where the rights of the subject only are concerned, and, therefore, the court held that the defendant was entitled to his discharge."—The contempts so excepted by that act are in cases of prosecutions in the name of the crown, at the charge of a private party, and the words of exception are, "unless the defendant in such prosecution shall pay to such private prosecutor, his executor or administrator, such costs as the court where, &c. shall award to be paid." Now the words of the stat. 5 & 6 Wm. & Mary, c. 11. s. 3. are in substance the same as those of the stat. 20 Geo. 2. c. 52. sect. 26. namely; "that the court of King's

" Bench

"*Beneb* shall on conviction give reasonable costs to the party injured, &c. who shall prosecute, &c. which costs shall be taxed according to the course of the court:" and therefore in respect of costs it appears to me that these are in like manner rights of the subject, with which the crown under a general act of grace could not interfere: if so, I incline to think that this is as much a civil suit as the cases excepted under the stat. 20 Geo. 2. c. 52. and it would be a very hard case, if the defendant could not be discharged under the lords' act, nor under a general act of pardon; for then he must be remediless.—*It was adjourned*, that precedents might be searched into.

Afterwards, on the last day of the term, Mr. Lucas cited a case from 5 *Viner's Abridgment*, title *Contempt* (D), pl. 10. *Baslam v. Denney*, where the court held "that an attachment after a decree for dismissal is in nature of an execution at law, and a general pardon may pardon the contempt, but not the debt." Mr. Cowper contra, insisted that there was no instance of a person in contempt being discharged under an insolvent act: with respect to an attachment being in the nature of a civil action, it clearly was not: because then the defendant might be declared against; but here he is not so in custody of the marshal as that he might be served with a declaration.

Mr. Justice Aston. (Lord Mansfield gone.) An attachment is an execution in a civil suit, and I apprehend it has long since been settled to be so. In the present case the contempt has no relation to the offence committed by the defendant, which, as far as public justice is concerned, has been sufficiently purged by the imprisonment he has suffered: but it arises upon an act of parliament 5 & 6 W. & M. c. 11. which directs "the costs in these cases to be taxed by the master, and unless paid in ten days, an attachment to issue." This stage of the cause therefore, is merely of a civil nature; and a matter solely between party and party unconnected with the offence itself. It seems that no case in point has been found: But the stat. 9 Geo. 3. c. 26. for the relief of insolvent debtors, is in my opinion a legislative recognition that they shall have the benefit in such cases. This last act indeed is temporary; but the lords' act is perpetual; and they are *in pari materia*: and therefore as the attachment is an execution for the debt to the party, whether the costs are taxed by the master of the crown office, or on the civil side, the defendant is equally entitled to his discharge. If not, the consequence must be imprisonment for life: for a general

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 Rex
versus
 Stokes.

1774. general pardon would not extend to him, as was agreed in the case of *Rex v. Stokes*. Mich. 23 Geo. 2.

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Mr. Justice Willes. These statutes which are made in favour of the liberty of the subject, ought always to receive a liberal construction. This is in all respects as a *civil debt*; and does not differ from the case of *other civil demands*. It seems to me that the stat. 9 Geo. 3. c. 26. meant to extend the benefit to insolvent debtors in the fullest manner; and I am the more inclined to adopt a liberal construction in this case, as the defendant, who is a *minor*, may otherwise lie in gaol for life.

Mr. Justice Ashburst. I am of opinion that this case may fairly be included under the words "debtor and creditor" in the lords' act: and therefore think the defendant ought to be discharged: especially, as otherwise he must be without remedy: because the king cannot by a general pardon release a *civil debt*; and no other alternative is open.

Rule made absolute.

Monday,
June 20th.

BLANDFORD and others, executors of FROUD, versus
FOOTE.

If the cause
of action
arises before
bankruptcy,
interests
and costs
accrued
since, are
likewise
discharged,
by stat. 12
Geo. 3.
c. 47. sect. 2.

UPON a rule to shew cause why the defendant who was an *uncertificated bankrupt*, and in custody upon a *ca. sa.* should not be discharged under the stat. 12 Geo. 3. c. 47. sect. 2. the facts appeared to be as follow. The defendant became indebted to the testator *Froud* upon bond in the year 1756, and about two years afterwards became bankrupt: subsequent to the bankruptcy, *Froud* brought an action upon the bond, obtained judgment, and died. After which, the executors brought a new action upon the judgment, and on this last action the defendant was now in custody.

Mr. Mansfield, who shewed cause insisted, that the judgment upon which the defendant had been taken, being subsequent to the commission sued out, the defendant was not within the favour of the statute; which expressly relates to any debt or debts due or contracted before such commission issued, and to such debts only.

Mr. Baldwin *contra*. That the defendant ought to be discharged; for though the judgment was signed after the commission issued, yet the cause of action was antecedent to the commission, and therefore within the intention of the statute,

Lord

Lord *Mansfield*. The only doubt that can arise in this case is with respect to the interest and costs accrued since the bankruptcy: but I think they stand upon the same foundation as the original debt which was clearly due before the bankruptcy, and therefore are equally within the benefit of the statute.

Mr. Justice *Willes*. I am of the same opinion. A case of this sort once came before me, and I consulted with my brothers upon it, who all agreed that the whole related to the original debt, and therefore was within the act. Mr. Justice *Aston* and Mr. Justice *Ashburst* concurred.

Rule made absolute.

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BLAND-
FORD
versus
FOOTE.

REX *versus* Overseers of BRIDGEWATER.

Same day.

UPON shewing cause why several appointments of overseers should not be quashed, the case appeared to be a contest between two adverse sets of Borough Justices. Each set met before midnight of *Easter* eve: and each began making their appointments of overseers the instant the clock had struck twelve; and so kept on renewing the same appointments for an hour or two. But one set of them made a fresh appointment at eight o'clock on the *Sunday* morning; supposing that there would be a contest concerning the priority of those appointments which were made soon after midnight, and perhaps all of them bad.

Mr. *Hotchkiss* shewed cause, and cited 3 *Bur.* 1595. *Swan v. Broome*, to prove the appointments good.

Lord *Mansfield*. The conduct of the Justices in this case is a shameful prostitution and abuse of their office for election purposes; and I wish any person could be found who would undertake to prosecute both parties. It would have been more for the interest of either side to have waited for a legal appointment on the *Monday*. I do not know that there is any authority which says that an appointment made on a *Sunday* is good; but it certainly is not a day for such purposes as these; and therefore I will not give my sanction to any of the appointments. Let all the appointments be set aside, and a *mandamus* be directed to the justices to make a new appointment; and let the mayor give two days notice of the time and place of meeting for such new appointment.

The three other judges concurred.

N. B. The matter was afterwards agreed between the parties.

The

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The Archbishop of CANTERBURY *versus* HOUSE.

A creditor has a right *ex debito justitiæ*, as well as the next of kin, to sue upon an administration bond in the name of the archbishop or his ordinary.

UPON a rule to shew cause, why the proceedings in an action upon an administration bond sued in the name of the archbishop in this case, should not be staid with costs to be paid by the assignee of the archbishop; the grounds for staying the proceedings were; *first*, that in fact the assignee, who was a creditor only, had no authority from the archbishop. *2dly*. That it was not competent to the archbishop to depute such authority to a creditor.

Mr. *Wallace*, who shewed cause, cited *Greenfield v. Benson*, 3 *Atk.* 248. as a case in point, that a creditor has a right to sue upon the administration bond. And with respect to the first point, it appeared clearly, upon the affidavits, that the archbishop had given an authority to the plaintiff to sue in his name, and that the attorney for the defendant was fully apprised of it: though upon a personal application by the defendant's attorney, to know if such authority were granted, the secretary of the archbishop at first informed him it had been refused, because Dr. *Ducarrel* had advised the archbishop, that it could not be granted to a creditor.

Lord *Mansfield*. No next of kin ever struggled for the administration of an insolvent estate with an honest view. What the object of the administratrix was in this case is very manifest upon the affidavits that have been read: namely, to sell the administration to the creditors. But failing of that purpose, after having obtained the administration, she makes use of all sort of chicane, delay, and false pleas to defeat the creditors, and at length absconds. This is the general state of the case. At last a creditor or creditors have brought an action upon the administration-bond in the name of the archbishop, and this is an application on the part of the administratrix to stay the proceedings in the name of the archbishop with costs, on two grounds: in the first place, that it is not competent to the archbishop to authorize a creditor to put the bond in suit, but only the next of kin. *2dly*. That the archbishop in his private person, has not deputed such authority to the present plaintiff.

With respect to the first point, let us see what it is which the act requires the archbishop or his ordinary to do: "He is to grant administration and to take bonds with condition that the administrators shall duly administer the intestate's effects; that they shall give an account of such their admini-

stration,

"stration, and make an inventory of the goods and chattels, and that they shall pay the surplus to the next of kin." Now it is agreed, that if the next of kin is desirous of suing upon this bond, the court will direct the ordinary to permit his name to be used, because the next of kin is interested in the surplus. In like manner if such application is made by a creditor, I see no reason why he should not have the same privilege; and I knew of no authority which says, that the ordinary cannot empower him to put the bond in suit. On the contrary, it is *ex debito justitie* that he ought to do so: for though a creditor has no concern in the latter part of the condition, namely "the distribution of the surplus among the next of kin," yet he is most materially and *principally* interested in the administrator's delivering in a *true inventory* and in the due administration of the effects. To one who has a *right*, it is *ex debito justitie* to grant the liberty of suing in the archbishop's name; to one who has *no* right, it is *ex debito justitie* to refuse it. As to the objection that it is liable to be abused, if any bad use were made of it, the court would no doubt set aside the proceedings. But in the present case, there is no pretence or even suggestion of any abuse: and therefore I am clearly of opinion that the plaintiff is well entitled to put the bond in suit.

The next ground is, that the archbishop in his *private person* gave no such authority to the present plaintiff. I think a personal application to the archbishop was very improper; for it is not his *personal* affair; his name is used *officially* only: and therefore I am not surprised that the archbishop should not recollect what was requisite upon the occasion. He might refer it to Dr. *Ducarell*; and if Dr. *Ducarell* gave the answer that is stated, he was ill advised. If the case rested there, and the attorney had been misled by that answer, it would have operated differently as to the costs. But it is in evidence that he had the fullest information afterwards that the archbishop had authorized the plaintiff to sue in his name. And therefore I am of opinion that the rule should be discharged with costs, to be paid by Mr. *Aylett* the attorney for the defendant.

The three other judges concurred.

GILLMAN *versus* HILL.

Thursday,
June 21st.

THIS was a rule to shew cause why judgment of execution in this case should not be set aside with costs, and the goods taken in execution restored; or if sold, why satisfaction should

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should not be made by the plaintiff, and why the warrant of attorney upon which the judgment was signed should not be cancelled. The rule was obtained upon an affidavit, stating, that the warrant of attorney was given by the defendant, whilst in custody, without any attorney being present on his behalf, though he had proposed to send for one: but was persuaded by the sheriff's officer, that the attorney's clerk, who attended for the plaintiff, would do as well. But now, upon reading the affidavit, it stated further, that the defendant was the more induced to sign and execute the bond and warrant of attorney, because he had before been informed, that if he did execute it under an arrest, and without his attorney being present, it would be void.

Mr. Buller shewed for cause, that upon the face of this affidavit it was clear the defendant was fully apprized of the act he was about to do; and assented to the proposal made with a manifest view to defraud the plaintiff.

Mr. Bearcroft *contra*, relied upon the two rules of court, *Pasf. 15 Car. 2.* and *Pasf. 4 Geo. 2.* the latter of which, taking notice of the great inconveniencies arising from a warrant of attorney to confess judgment by one in custody being held good, if any attorney, though for the opposite party, was present, expressly provides, that for the future there shall be an attorney present on behalf of the defendant.

Lord Mansfield. I shall say of these rules, what the court of Chancery has often said with respect to the statute of frauds; *that no rule of the court shall be made an instrument of fraud.* These rules were made for the protection of indigent defendants against the practices of hard designing plaintiffs; and therefore have admitted of many *exceptions under circumstances*: as where a person who is in prison at *one man's suit*, executes a warrant of attorney to confess judgment to *another* who did not arrest him. There the judgment is well given; for the *cause fails**; and therefore though within the *letter* it is not within the *intent* of the rule. Much less will the court suffer a defendant to convert that which was meant for his protection into an instrument of fraud and deceit: and here it is avowed by the defendant himself in his own affidavit that he intended to cheat the plaintiff. Therefore let the rule be discharged with costs.

The three other judges concurred.

THE END OF TRINITY TERM.

* 2 Lord
Raym. 797.
3 Bur.
1793.

MICHAELMAS TERM

15 GEORGE III. B. R. 1774.

VALLEJO and another *versus* WHEELER.Thursday,
Nov. 10th.

THIS was an action on a policy of assurance upon goods on board the *Thomas* and *Matthew*, from *London* to *Seville*. The policy was made in the common form, with liberty to touch at any ports or places, &c. The loss was assigned different ways in the declaration; *First*, by storms and perils of the sea, in consequence of which, the ship was obliged to go to *Dartmouth* to be repaired; and that afterwards, a further loss happened by storms, &c. *Secondly*, That it happened by storms and perils of the seas in the voyage generally; and *Thirdly*, by the *barratry* of the master.

The cause was tried before Mr. Justice *Ashurst* at *Guildhall*, at the sittings after *Easter* term 1774, by a special jury. On the trial it was proved, that this ship was put up as a general ship from *London* to *Seville*, and was let to freight by one *Darwin*, who chartered her to *Brown* the captain. That it is the course of vessels going on this voyage, to stop at some port in the west of *Cornwall*, to take in provisions. That this ship having taken her cargo aboard, sailed from *London* to the *Downs*; while she lay there, all the other ships bound to the westward bore away; but she staid till the night after, and then sailed to *Guernsey*, which was out of the course of the voyage. That the captain went there for his own convenience, to take in brandy and wine on his own account; after which he intended to proceed to *Cornwall*. That the night after the ship quitted *Guernsey*, she sprung a leak, which obliged her to put into *Dartmouth*.

Barratry is every species of fraud or knavery in the master or mariners of a ship, by which the owners or freighters are injured; and a deviation, if such, is *barratry*; whether the loss happen during such fraudulent voyage, or after. *Otherwise*, if the deviation be with their privacy or consent.

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When she was refitted she set sail again and proceeded for *Helford* in *Cornwall*, where it was always intended she should stop to take in provisions; but in her way she received further damage, and at her arrival was totally incapable of proceeding on the voyage, and the goods were much damaged.

It was attempted on the part of the defendant to prove, that *Willes* was the owner of the ship; that the voyage to *Guernsey* was on his account, and the goods taken on board there his property: but this evidence went little further than information and belief, except that it was proved, that when the ship arrived at *Helford*, the wine was delivered to him in his cellar.

The judge directed the jury, that if the going to *Guernsey* was *without the knowledge of Darwin*, it was barratry; and they ought to find for the plaintiff; but if done with his knowledge, then it was not barratry: and if they should be of opinion that it was without the knowledge of *Darwin*, then he desired them to say, whether they thought it was with the knowledge of *Willes* or not. The jury found a verdict for the plaintiff, and said they thought the going to *Guernsey* was without the knowledge of *Darwin*, whom they looked upon to be the owner, but they thought it was with the knowledge of *Willes*.

In Trinity term last, a motion was made for a new trial; and on shewing cause all the counsel on each side were heard. The court then said, there were two points in the case. *First*, Whether to entitle the plaintiff to recover, the loss must not have happened during the time of the barratry, or have been occasioned immediately by the act of barratry. If a policy be on a ship, and the ship is seized for smuggling, that is barratry; but here the goods were not seized for smuggling, nor did the loss happen during the act of barratry, but afterwards. *Secondly*, Whether though the ship were let to freight, the captain was not subject to the orders of the owners. If a ship be let out generally to freight, the freighter is owner for that voyage; but if there be only a covenant to carry goods, the owner of the vessel would have the direction of her, and the hiring of the master and mariners.

The court ordered that the case should stand over till this term, and be argued by one counsel on each side. It was now argued by Mr. *Buller* for the plaintiff, and Mr. *Alleyne* for the defendant.

For the plaintiffs. The question is, Whether the plaintiffs are entitled to recover for this damage from the underwriters? In order to support their claim they insist, that the conduct of the master in going to *Guernsey*, for the purpose and under the circumstances mentioned, was *barratry*.

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Supposing this to be *barratry*, then another question will arise, namely, Whether the loss sustained by the plaintiffs was in consequence of that *barratry*; or, whether that loss stands so totally unconnected with the voyage to *Guernsey*, as to be quite unaffected by it?

In all the cases that have occurred on *barratry*, different definitions of the word have been attempted; and the same conduct has been observed in the present case: however, there will not be much difficulty in determining what is meant by the term in its *general* sense, whatever nicety may arise in fixing the *precise* limits of it, when occasion requires that should be done. Wherever a great nicety does arise, the insured should be entitled to the turn of the scale: for the end and view of insuring is, to secure the merchant against all losses and misfortunes whatever: and so very liberal are the underwriters in these days of their professions in policies of what they do insure against, that some writers have thought it next to impossible that where a loss does happen a doubt should remain. *Molloy*, B. II. cap. 7. sect. 7. says, "almost all those curious questions that former ages and the civilians according to the marine law, nay and the common lawyers too, have controverted, are now out of debate. Scarce any misfortune that can happen, or provision to be made, but the same is provided for in the policies that are now used: for they insure against heaven and earth, stress of weather, or whatsoever detriment shall happen or come to the thing insured."

Barratry in all the dictionaries is defined to be *fraus, dolus*, or *deceptio*. So are *Minsbrow*, *Dufresne*, and *Spelman*.

Fraud means not only a crime, but any wilful fault or evil design; and even a neglect, provided it be *crassa negligentia*, will amount to *barratry*; which was the case of a master sailing out of port without paying duties*. That case approaches the nearest to the present of any that can be found, and even goes beyond it. That was merely a neglect, and might have been by accident, as well as design; but because it subjected the ship to forfeiture, it was holden to be *barratry*.

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In this case the consequence was the same; for the act of the captain subjected the ship and the goods insured to forfeiture; but the act done was infinitely worse. It did not rest merely in a non-feasance, but was a formed premeditated scheme of running away with the ship out of the course of the voyage; done for an illegal purpose, for his own private benefit, without any excuse or necessity, and neither for the benefit nor with the knowledge of the owner or freighter.

One definition of barratry given at the bar was, where the master and mariners conspire together to run away with the ship. That certainly is one species of barratry; but it can never serve as a general description of it; if it were, barratry could never be committed without the concurrence of the mariners as well as the master: the contrary of which is clear from the case of the master not paying duties, and from every other case on the subject: and barratry may be committed by the master alone, or by the sailors alone. *Poslethwaite* in his *Dictio. Tr. and Com.* vol. 1. p. 214. says, "barratry is when the master
" of a ship or the mariners cheat the owners or insurers, whether
" by running away with the ship, sinking her, deserting her,
" or embezzling the cargo." The owners or insurers are as much cheated and defrauded if the vessel is run away with by the sailors, as if it is run away with by the master. But *Poslethwaite* in 1 vol. 136, title *Affurance*, gives a definition of barratry which applies more immediately to the present case. He says "one species of barratry in a marine sense is, when
" the master of a ship defrauds the owners or insurers by
" carrying a ship a different course to their orders."

The only two cases in the common law books that are worth mentioning are *Knight versus Cambridge, Str.* 581. 1 Lord Raym. 1349. S. C. and *Stamma versus Brown, Stra.* 1173. In the first of these cases it is holden that barratry extends to every fraud of the master; and what is said at the conclusion of that case, is the best doctrine that can prevail in insurances. "The end of insuring is to be safe at all events; and it would
" be very prejudicial if the court were to be making loop-holes
" to get out of policies. The insurer knows the master, and
" whether he can trust him; and he that insures against his running away with the ship, never imagined he might or would be
" guilty of any other fraud." The principles of the second case apply very strongly to the present: for here there was a formed design to deceive the insured; the captain did not go to *Guernsey*

sey for the benefit of his owners, but for his own benefit only; and in going there he acted inconsistent with his duty to his owners.

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It was said in the former argument, that it would be very extraordinary if the underwriter was to insure against the act of persons employed by the insured, and who were unknown to the insurer. As to that point, it is observable in the *first* place that this was a *general* ship; a circumstance that is much relied on among merchants, and which in this case is by them esteemed decisive on the present subject. And there seems to be great reason for a distinction between a *general* ship, and one that is *let to freight* to a *single* person only. The former carries the goods of all mankind; every man that chuses is at liberty to load his goods aboard her; and the merchant who ships his goods in such a vessel, has no command over her. He does not hire or employ the master; neither is the master subject to his order or direction during the voyage. But in the case of a vessel let to freight to one merchant only, and by him alone freighted, he may be supposed to employ the master, and have the direction of the vessel and the voyage; and therefore whatever is done by the captain is to be considered as done by the merchant's servant.

But 2dly, it must be presumed the master is known to the insurer; if not, it is the insurer's own fault, and he shall not avail himself of the want of such knowledge. Every policy specifies who is the master; and if the insurer agrees by his contract (as in policies is often done) that any other person at the election of the insured may go as master, that is waiving a personal knowledge of him; and no objection can then be made by the insurer, for want of knowing who the master is. In this case *Brown*, who was the man that went as master, is the person mentioned in the policy.

If this question were tried by the laws of any other mercantile country it would hardly admit of a doubt. 2d. *Magens. Ord. Middleb. sect. 14. Ord. Rotterd. sect. 52. Ord. Amsterd. sect. 6. Ord. Hamb. tit. 4. sect. 6. tit. 5. sect. 1. tit. 7. sect. 1. Ord. Stockholm, art. 5. f. 11. 16. art. 6. f. 14.* There is no ordinance of *Florence* that applies immediately to this point: but from the form of their policies, it may be collected what would be the determination of that place on the matter; for they insure against all perils, misfortunes, and other cases and accidents even such as cannot be thought of. And in their

1774. ordinances there is a provision, that in case of a dispute, the underwriter shall pay the money first and go to law afterwards.

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WHEELER. These ordinances are founded on good sense and sound reason, when the nature of insurances is considered: and in mercantile transactions, and such general subjects as this is, no doubt, the laws of other countries will have their weight in the courts of *England*.

The end and meaning of an insurance is, to enable one man, for a valuable consideration, to put another in his place to a certain amount, for all risks and perils which the first man may sustain. All that is requisite on the part of the assured in these contracts is, that they are made *bonâ fide* without fraud, concealment, or contrivance: and where that is done, the policies and ordinances of the different countries mentioned, seem all to agree in this, that every peril is insured against, except such as happen by the means, consent, or privity of the insured.

Insurances in *England* are not meant, either by the law or the parties, to be narrower or more confined than policies in other countries; and though, after a loss has happened, underwriters catch at every reed they can to avoid paying the insurance money, yet if the question were put to them at the time of underwriting, even *they* would not hesitate to declare themselves liable for many accidents which are afterwards called into very serious debate.

Not long ago a question was made, whether the underwriter should be liable where the ship was not sea worthy, but the defect unknown to the insured. The underwriter succeeded, and was holden not to be liable; but what was the consequence? A clause was inserted in the policies (as it is in the present) that any insufficiency in the ship, not known to the assured, should not prejudice the insurance: and the underwriters subscribed with this clause for the same premium as they did before without it. This is a pretty strong proof what they would have said themselves, if they had been asked that question before they underwrote; though their opinions were altered after the loss had happened: it is also a proof, that they considered their obligations to be as extensive as those on underwriters in other countries; and that they were answerable for all losses not occasioned by the means, consent, or knowledge of the insured.

On these authorities and for these reasons, it may be said, the going to *Guernsey* in the manner and for the purpose the master of this vessel did, was barratry: and it is the more certain,

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tain, because the court said in the last term, that if this ship had been seized as forfeited on account of this smuggling transaction it clearly would have been barratry. Now the seizure could not be the act that constituted the barratry; but it must have been something preceding: namely, the going to *Guernsey* for an illicit purpose, and doing an act which subjected the ship and goods to seizure. For in the case of not paying duties, it does not appear that any seizure was actually made; but it was holden barratry because the goods were *liable to be* seized.

Supposing this to be barratry, then the only question which remains is, Whether the loss that the plaintiffs have sustained was in consequence of that barratry?

The best way of determining this question is to see whether the accident would have happened if the ship had never gone to *Guernsey*; and it certainly would not: for the storm happened and the accident was received before the ship got into her proper course to *Helford*. If she had not gone to *Guernsey* she would never have met with the storm.

In the next place, suppose the ship had never gone to *Guernsey*, but had pursued her proper course and the goods had been damaged in the manner they now were; What would have been the consequence with respect to the insured? they would have been entitled to a satisfaction from the insurers. What then shall excuse the insurers now? Shall the barratry of the master? there is nothing else to excuse them: but barratry, instead of excusing, makes the underwriter liable.

But 1st, It is not necessary that the injury should be received, in the very act of committing the barratry: and 2dly, If it were, this injury was received during the act of barratry. What is the act of barratry? running away with the ship for an illegal purpose. The instant the master had changed the course of the ship's voyage, for the purpose he did, he had committed barratry. Must the injury then be received at the moment he varied his proper course, in order to charge the insurer? Suppose the injury had been received just before he got to *Guernsey*, or in going into *Guernsey*, should not the underwriter be liable? and if liable for a damage done before he got into *Guernsey*, why shall he not also be liable, for an injury sustained after he left *Guernsey*?

If the insurer were to be discharged from this loss, because it did not happen in the moment of the barratry's being committed,

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mitted, the condition of the insured would be unfortunate indeed! for if it had not been for the barratry, and the loss had happened, he certainly would have been entitled to the benefit of his policy; and therefore his condition would be this; by means of the barratry of the master, which is one of the accidents he insures against, he would lose his goods, and the benefit of his policy likewise.

But 2dly, this injury was received during the act of barratry. The master went to *Guernsey* in order to take contraband goods aboard his vessel, and smuggle them to *England*. At the time the loss happened he was bringing the smuggled goods to *England*, but he had not then completed his purpose; and was at that time pursuing his barratical design.

For all or some of these reasons the plaintiffs would be entitled to the judgment of the court, even if the case had come on in a very different shape from what it now does.

But here the question is, Whether the defendant is entitled through the favour and interposition of the court to a new trial, which the court will not grant, unless it be clear that the verdict is against law. If it be doubtful, the case ought not to undergo further litigation: for it has already been tried by a special jury of merchants, among whom was a very considerable underwriter. They who are conversant with business of this kind, have entertained no doubts; and the verdict given was with the entire approbation of the judge who tried the cause: therefore a new trial cannot be granted without reprobating the verdict that has already been given.

Mr. *Alleyne*, for the defendant argued, that barratry was,

1st. Where an injury is committed by the master and mariners, which causes a confiscation.

2dly. Where a direct injury is done to the owners, with a direct intention to commit that injury.

Though in the present case a small quantity of brandy was found on board the vessel, which was confiscable, yet this cargo was found not to be so.

Barratry means mal-practice, or deceit, with respect to ships or goods, *Savary Dictionnaire de Commerce, tit. Barratry. Melloy, 2 B. 13.* considers barratry as a mal-practice against the cargo. *Postlethwaite Dict. Trade and Commerce, 214.* "Barratry is
" where the master of a ship, or mariners, cheat the owners or
" insurers

“insurers, whether by running away with the ship, sinking her, “deserting her, or embezzling the cargo.” The act of the master is not insured against, unless barratry is mentioned: and the underwriter is not liable, unless the act of the master does amount to barratry.

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By the *Ord. of Rotterd.* 43. 52. it is provided, “that owners “shall not insure against the barratry of masters of their own appointment, but may against his neglect.” All the ordinances cited for the plaintiffs are open to this observation, that they are *positivi juris*.

If the doctrine laid down on the other side were to hold, every neglect of the master would amount to barratry.

In the case of *Johnson* versus *Proudfoot*, at the sittings in *London*, it was holden, that a ship staying in the *West Indies* till the hurricanes came on, did not amount to barratry.

LORD MANSFIELD. That was holden to be a deviation.

MR. ALLEYNE. Every deviation is not barratry. In *Stamma* versus *Brown*, the chief justice did not say what was barratry: in *Elton* versus *Brogden*, *Stra.* 1264, the crew opposed the captain, and forced him to go contrary to orders; and yet that was holden not to be barratry; but it was adjudged to be one of the accidents insured against, and so the insurers were liable. Therefore a consequential injury is not within the meaning of barratry, but it must be direct and designed.

In this case *Darwin* was not the owner, neither did he appoint the master.

Lastly, it cannot be contended that this was done with a view to defraud the owners, because his intention was only to get a little money himself, without injuring them.

In reply, Mr. Buller insisted, that the voyage insured was totally at an end, and it was impossible, after that, ever to get into what could be called the course of this voyage from *London* to *Seville*; for that having been deserted, the policy was forfeited or discharged, and could never be brought into force again.

Though the ship and cargo in this case were not seized as forfeited, yet they were all liable to be forfeited, by having smuggled goods aboard: therefore the act done was equally unlawful; and would in law as much constitute barratry as if the goods had actually been seized.

With respect to the several definitions given of barratry in the books cited for the defendant, though they might properly comprehend some species of barratry, yet they did not

1774. import to be a general definition of it, and to comprehend all cases. *Posslethwaite* 1 vol. 136. is more general in his description of it, and more applicable to the present case; and the propriety of his definition has not been denied.

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Though it may be true that the act of the master is not insured against unless barratry is mentioned in the policy; yet the reverse is equally true: namely, where barratry is mentioned, the act of the master, though done by him only, and without the concurrence of the crew, is insured against. And though by the *Ords. of Rotterdam*, an owner cannot insure against the barratry of a master of his own choosing, yet the law of *England* clearly is different: and notwithstanding the master is appointed by the owner, there is not a policy which amongst other perils does not guard against the barratry of the master.

It is true that all the ordinances cited are *positivi Juris*: and therefore if the law here is settled contrary to them, they cannot prevail; but if not, the law of foreign countries in mercantile transactions, has always been attended to in courts of Justice in *England*, and will afford a reasonable ground to decide in doubtful cases.

As to *Darwin's* not being the owner, it has already been stated how far he appears to have been so; and in fact he did appoint the master for this voyage. And though the captain's principal view in this case might be to put money in his own pocket, yet that does not at all lessen the offence which he has been guilty of, or alter the fraud which he has practised against the owners. By going to *Guernsey* he has defrauded them, and unless that does amount to barratry, he has deprived them of all benefit of their insurances. In the case of sailing out of port without paying duties, the captain did not mean to steal the goods; he intended only to have put that money in his own pocket; and if he had not been detected would still have carried and delivered the goods in the destined voyage.

Here the act done was for the captain's private benefit, without the knowledge of the insured; on the contrary it was to their prejudice, it endangered the loss of their goods, destroyed the policy unless it amounted to a forfeiture of it; and was unlawful in itself, for which reason it amounted to barratry.

Lord

Lord MANSFIELD, after stating the case at large, delivered his opinion as follows :

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The ground of the motion for a new trial in this case is, that under the circumstances of the case as they were given in evidence to the jury, the carrying the ship to *Guernsey* was merely a *deviation* but not *barratry* : and much more stress was laid at the trial, than in either of the arguments, upon this particular fact ; namely, that the deviation being with the knowledge of *Willes* the owner (though not owner *pro hac vice*) of the ship, it could never be *barratry* : the jury therefore were pressed to say whether it was with the consent of *Willes* or not ; and they said it was. To be sure nothing is so clear, as that if the owner of a ship insures and brings an action on the policy, he can never set up as a crime a thing done by his own direction or consent. It was, therefore, a material fact to proceed upon, if *Willes* had had any thing to do in the case ; but he had not.

It appeared to me that the nature of *barratry* had not been judicially considered, or defined in *England* with accuracy. In all mercantile transactions the great object should be certainty : and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon. But it is not easy to collect with certainty from a general verdict, or from notes taken at *nisi prius*, what was the true ground of decision. Therefore in this as in all doubtful cases, I wished a case to be made for the opinion of the court.

It appeared on the former argument and now, that there are but three common law cases relative to *barratry*. The first is *Knight and Cambridge, Strange* 581. where the neglect of the captain in not doing his duty, was adjudged *barratry* ; for it was his duty to pay the port duties before the ship went out of port ; and he being guilty of neglect in not discharging them, it was adjudged to amount to *barratry*.

The next is the case of *Stamma versus Brown* ; 2 Str. 1173, where the opinion of the chief justice in his direction to the jury is very strong to the present case : the ship being chartered, and having taken goods on board for a voyage directed to *Marseilles*, had passed by *Marseilles*, and therefore went out of the voyage. The chief justice in his direction told the jury, that this being against the express agreement to go first to *Marseilles*, seemed not to be a simple deviation only, but a formed design to de-

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ceive the contractor. The jury stayed out some time, and on their return asked the chief justice, whether, if the master was to have no benefit to himself by passing by *Marseilles*, and went only to the other places for the benefit of the owners, it would be barratry? The chief justice answered it would not. Whereupon the jury found a verdict for the defendant. Upon a motion for a new trial it was refused, because it appeared to the court that notice had been given to the agent of the plaintiff, that the voyage was to be altered, and that he was at liberty to take his goods out of the ship, if he disapproved of such alteration; and to make it barratry, there must be something of a criminal nature as well as a breach of contract.

The last common law case is, *Elton versus Brogden*, 2 Str. 1264. In that case neither the terms of the first or second policy are stated, and yet they must have been special. The only question seems to have been, whether the capture of a second prize justified the second return of the ship to *Bristol*. The court held it did: if so, there could be no barratry; because the captain and mariners acted to the best of their judgment, for the benefit of the owners. Whatever excused the deviation, proved that the deviation could not be barratry. The circumstances which induced the court to be of that opinion are not stated.

But these cases do not afford any precise definition of what barratry is; therefore I wished the cause to stand over to be argued by one counsel on a side. I have in the mean time considered of it, and consulted with men conversant in mercantile affairs, and I am now very clear.

The first thing to be considered is, what is meant by barratry of the master. I take the word to have been originally introduced by the *Italians*, who were the first great traders of the modern world. In the *Italian Dictionary* the word "*Barratrare*" means to cheat, and whatsoever is by the master a cheat, a fraud, a cozening, or a trick, is barratry in him: nothing can be so general. Here the underwriter has insured against all barratry of the master, and we are not now in a case of the owner or freighter being privy to it; if we were, nothing is so clear as that no man can complain of an act done, to which he himself is a party.

In the present case all relative to *Willes* may be laid out of it. He is originally the owner, but not the insured here. *Darwin* was the freighter of the ship, and the goods that were on board were

were his: if any fraud is committed on the owner, it is committed on *Darwin*. The question then is, What is the ground of complaint against the master? He had agreed to go on a voyage from *London* to *Seville*; *Darwin* trusts he will set out immediately; instead of which the master goes on an iniquitous scheme, totally distinct from the purpose of the voyage to *Seville*: that is a cheat, and a fraud on *Darwin*, who thought he would set out directly; and whether the loss happened in the act of barratry, that is, *during* the fraudulent voyage or *after*, is immaterial; because the voyage is equally altered, even though there is no other iniquitous intent. But in the present case, there is a great deal of reason to say, that the loss sustained was in consequence of the alteration of the voyage. The moment the ship was carried from its right course, it was barratry; and here the loss was immediately upon it. Suppose the ship had been lost *afterwards*, what would have been the case of the insured, if not secured against the barratry of the master? He would have lost his insurance, by the fraud of the master; for it was clearly a deviation; and the insured cannot come on the underwriters for a loss, in consequence of a deviation. Therefore I am clearly of opinion, this smuggling voyage was barratry in the master.

ASTON, Justice.—I wonder that there should remain a doubt at this time of day, what is meant by barratry in the master. In different ordinances different terms are used, but they all have the same meaning. In one of the ordinances of *Stockholm* it is called "*Knavery* of the masters or mariners," and the facts stated in the present case clearly fall within that description. Where it is a deviation with the consent of the owner of the vessel, and the master is not acting for his own private interest, in such case it is nothing but a deviation with the consent of the owner, and the underwriter is excused. In the present case the hulk of the ship belonged to *Willes*, but he had nothing to do with it, having chartered it to *Darwin*; the jury, therefore, did right to consider *Darwin* as owner *pro hac vice*. Having considered him in that light, the conduct of the master was clearly barratry. For he was acting for his own benefit, and without the consent, or privity, or any intended good to his owner. Nobody knows when the first commencement of the injury happened; but most probably on the return of the ship to *Dartmouth* from *Guernsey*, where he had been for the purpose of smuggling. Therefore, I am clearly of opinion that this change of the voyage for an iniquitous purpose was barratry; which is not confined to the run-

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ning away with the ship, but comprehends every species of fraud, knavery or criminal conduct in the master by which the owners or freighters are injured.

WILLES Justice concurred. The only doubt I had in this case was, when the loss accrued; and I think it may reasonably be said to have happened in consequence of the smuggling voyage: for if the ship had proceeded on her first intended course, she would have escaped the storm. Though this was a deviation, yet it is a just and fair rebutter to say, that it was barratry in the master, which is insured against in the policy. I think the justice of the case is on the side of the plaintiffs, and therefore that there ought not to be a new trial.

ASHHURST Justice. I continue of the same opinion as I held at the trial: and I think the plaintiffs have a right to recover on either count in the declaration. *First*, For the loss at sea. For it does not lie in the mouth of the insurer to object on the ground of its being a deviation, and so prevent the plaintiffs from recovering on that count: because the act of the master is a fraudulent act; and if the loss is consequential upon such fraudulent act, it is barratry against which the party is insured: and therefore the insurers shall not object upon a fact which is itself a forfeiture of the policy.

Secondly, I think, for the reasons already alleged by my Lord Chief Justice, and my Brethren, that it may fairly be said, the loss accrued in consequence of the barratry of the master. Therefore I concur that the rule should be discharged.

Mr. Justice Willes agreed with Mr. Justice Ashhurst that the plaintiffs were entitled to recover on either count.

Rule for a new trial discharged.

Saturday
Nov. 12th.

KENYON and others *versus* LEVI SOLOMON.

One who
was a
bankrupt
came from
Holland
with intent
to surren-

A Motion had been made to discharge the defendant out of custody, as having been arrested in coming to surrender himself as a bankrupt. The motion was grounded upon the statute 5 Geo. 2. c. 30. *sect.* 5. which enacts "that a bankrupt

der himself on the *forty-second* day: but hearing his time was enlarged, resolved not to surrender till the *enlarged* day. In the mean time he was arrested; and the court held he should not be discharged. For, till actual surrender, the statute 5 Geo. 2. c. 30. meant to protect a bankrupt only during such time as it might be reasonable and convenient for him to come in and submit himself to the commission.

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" shall

"shall be free from arrests, *in coming to surrender*, and from actual surrender for the forty-two days, or such further time as shall be allowed for finishing his examination."

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The case as it appeared upon the defendant's own affidavit was as follows; that he came from *Holland to England* within the 42 days, with intent to surrender himself upon the 42d day: but finding that his time for surrendering himself had been enlarged to a further day, he then laid aside his design of surrendering himself upon the 42d day, and did not mean to surrender himself till the enlarged day. In the intermediate time, he was arrested by one of his creditors. The question was, Whether he was privileged by this statute, as "a bankrupt coming to surrender himself?"

Upon shewing cause this day, Mr. *Dunning* argued that he was: Mr. *Wallace* and Mr. *Lucas* that he was not.

LORD MANSFIELD.—Nothing can be plainer than this case. The act allows a bankrupt 42 days to surrender in; but the sooner he surrenders the better for the creditors. Therefore, to induce bankrupts to surrender, a privilege is held out to them by *stat. 5 Geo. 2. c. 30.* namely, "that in coming to surrender, they shall be free from arrest, and also after actual surrender for the space of 42 days, or such further time as shall be allowed for finishing their last examination." But this is a *particular* privilege to enable them to surrender; and till actual surrender confined to the act of their going *with that view*; not a *general* privilege during the whole time which the act of Parliament allows them to surrender in. Nevertheless, if a bankrupt be abroad as this man was, and upon his return with an intention to surrender, is arrested on his landing, or within a day or two after his arrival, before he can conveniently make his surrender, it would be too rigorous a construction of the statute to say, he shall not have a reasonable time in which to execute such intention; because in fact he is on his way to surrender. But here the bankrupt, instead of surrendering on his arrival, swears he had no intention of doing so till the last moment of the time allowed him for finishing his last examination. There is no pretence, therefore, for saying he is within the privilege of being free from arrests in coming to surrender; which must be confined, like the case of witnesses arrested in attending the court, to a reasonable time *eundi et redeundi*; and beyond that the privilege does not extend.

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ASTON, Justice.—There is no ground or pretence for the defendant being discharged. Instead of surrendering himself in a reasonable time after his arrival, he wilfully delays to surrender himself: and the meaning of the legislature was not to protect bankrupts, who withhold themselves from their creditors during the whole length of time allowed for their surrender; but those only who are active in submitting themselves to the several statutes concerning bankrupts as soon as conveniently may be. Therefore I am clearly of opinion the defendant is not entitled to his discharge. Mr. Justice *Willes* and Mr. Justice *Ashurst* concurred.

Per. Cur.

Rule discharged.

Monday,
Nov. 14th.Lord Mans-
field absent.

NUNCOMAR versus BURDETT.

MR. *Willes* moved that proceedings might be staid till security should be given to the defendant for his costs, in case of the plaintiff's failing of success; as the plaintiff's residence was in the *East Indies*, at *Calcutta* in *Bengal*.

ASTON, Justice.—It is every day refused. I have many notes of its being so.

Take nothing by the motion.

Tuesday,
Nov. 15th.

One having by will devised all the residue of his estate of what kind or quality soever to W. P. afterwards purchases copyhold lands, and surrenders them to such uses as he shall by his last will declare, limit, and appoint.

DOE ex dem. PATE versus DAVY.

IN ejectment brought for the recovery of certain premises in the manor of *Hampstead* in the county of *Middlesex*; the jury found a verdict for the plaintiff, subject to the opinion of the court upon the following case.

That *William Davy* by his will dated the 2d of *April* 1767, duly attested by three witnesses, after several legacies bequeathed to particular persons, made the following residuary devise, "And as to all the rest and residue of my estate, of what nature, kind and quality soever, I give, devise and bequeath the same unto my said brother *William Pate*, his heirs, executors and administrators, according to the nature of the respective estates."

On the 16th of *May* 1768, the testator purchased a customary messuage situate in *Hampstead*, to which he was admitted in fee; and afterwards surrendered it as follows: "To such uses, intents, He afterwards makes a codicil, and thereby ratifies and confirms all and every the gifts, devises and bequests in his said will, except what he had altered by the codicil; and desires the codicil may be annexed to, and taken as part of his will to all intents and purposes—This amounts to a republication of his will so as to make the after purchased copyhold lands pass by the residuary devise.

" and

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" and purposes as he the said *William Davy* shall by his last will
" and testament in writing thereof direct, limit, and appoint."

On the 8th of *May* 1769 the testator purchased and was admitted to another piece of land, and surrendered it in the same manner. On the 18th of *Nov.* 1769, he made a codicil duly attested by three witnesses; by which reciting, that he had by his will devised all his fee-farm rents in manner there mentioned, he devised the same to *Catharine Davy*, widow of his brother *John Davy*, and her assigns, during her natural life, together with his house, furniture, coach, &c. and then proceeds as follows; "*I do hereby ratify and confirm all and every the gifts, devises, and bequests contained in my said will, except what I have hereby altered; and I do desire that this present writing may be annexed to and accepted and taken as a codicil to my will to ALL INTENTS AND PURPOSES.*" At the date of the will the testator had no copyhold lands; but at the date of the codicil he had the copyhold lands before mentioned. The question was, Whether the copyhold lands passed to the plaintiff by the will?

Mr. *Lee* for the plaintiff.—The copyhold lands do pass. *First*, If they had been purchased antecedent to the date of the will, the residuary devise, though silent as to copyhold lands, would have included them: for it has been decided, that copyhold lands pass by a devise of all the testator's real estate. *Acherley v. Vernon*, 9 *Mod.* 75. The only question then is, Whether the execution of the codicil, subsequent to the purchase and surrender of the copyhold estates, amounts to such a republication of the will, as to pass them? It clearly does; because no precise form of words is necessary; but any which denote the continuance of the testator's mind, are sufficient. Here the codicil has an express reference to the will, and in terms ratifies and confirms every gift in it.

In *Heylin v. Heylin* * argued in this court last term, it was * *ante*, 130. adjudged, that the circumstance of a testator's expunging a legacy, coupled with an intermediate purchase and surrender of copyhold lands to the uses of his will, amounted to a republication so as to pass such newly purchased copyhold lands. In *Potter v. Potter*, 1 *Vez.* 438. the testator by a second codicil, on a separate piece of paper, and without date, revoked so much of his will as should be found to be inconsistent with such codicil, and confirmed the rest. It was held by Sir *J. Strange* Master of the Rolls, that this latter codicil was a republication, so as to pass lands only contracted for at the date of the testator's will under the

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the general words contained in the will, even if they had not passed before; which, however, *his Honour* inclined to think they had.

Here the testator directs the codicil to be annexed to his will; clearly, therefore, it is a republication; and consequently the after purchased copyhold lands pass under the general residuary devise.

Mr. *Mansfield* for the defendant. The copyhold lands descend to the heir at law. At the date of the will the testator had no copyhold estate: clearly therefore he had no intention to pass any copyhold estate to the devisee. He afterwards purchases the copyholds in question, and surrenders them "to such uses as he shall declare by his last will;" not to the uses "declared" or to be declared by his last will," as was the case of *Heylin v. Heylin*; and the ground upon which that case was decided; namely, that it was a republication by reference to uses already declared by a will then existing. He then makes a codicil, whereby he ratifies and confirms every gift in his will, except what he had particularly altered by it. This is a ratification only of what he had before expressly given by his will, and nothing else. But the will contains no gift or devise of any copyhold lands, nor does the codicil refer to any. On the contrary, it is clear that the only object the testator had, in adding the codicil, was, to make the particular alteration there mentioned; consequently the copyhold lands are undisposed of, and the heir at law is entitled to them by descent.

Mr. *Lee* was going to reply: But Lord *Mansfield* asked him, if he had seen the case of *Acherley v. Vernon*, as reported in *Comyn* 383. where the testator by a codicil, reciting, that he had made his said will, adds "I hereby ratify and confirm my said will, except in the alterations aftermentioned;" and Lord Chancellor *Macclesfield* decreed, that the will was confirmed by the codicil; that the testator signing and publishing his codicil in the presence of three witnesses was a republication of his will, and both together made but one will; and by the said will and codicil his fee-farm rents, and assart rents purchased after the will did well pass. Lord *Mansfield* said this case was decisive of the question.

Aston Justice. It is an authority exactly in point. Mr. Justice *Willes* and Mr. Justice *Asbūrst* concurred.

Per cur. Let the *Posse* be delivered to the plaintiff.

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ON the 8th of *June*, in last term, Mr. Justice *Gould* came personally into court, to acknowledge his seal affixed to a bill of exceptions in this case; and errors having been assigned thereupon, they were now argued.

This was an action of trespass, brought in the Court of *Common Pleas* by *Anthony Fabrigas* against *John Mostyn*, for an assault and false imprisonment; in which the plaintiff declared, that the defendant on the *first* of *September*, in the year 1771, with force and arms, &c. made an assault upon the said *Anthony*, at *Minorca*, (to wit) at *London* aforesaid, in the parish of *St. Mary le Bow*, in the ward of *Cheap*, and beat, wounded, and ill-treated him, and then and there imprisoned him, and kept and detained him in prison there for a long time, (to wit) for the space of *ten months*, without any reasonable or probable cause, contrary to the laws and customs of this realm, and against the will of the said *Anthony*, and compelled him to depart from *Minorca* aforesaid, where he was then dwelling and resident, and carried, and caused to be carried, the said *Anthony* from *Minorca* aforesaid, to *Carthagera*, in the dominions of the King of *Spain*, &c. to the plaintiff's damage of 10,000 *l*.

The defendant pleaded 1st. Not guilty; upon which issue was joined. 2dly. A special justification, that the defendant at the time, &c. and long before, was governor of the said island of *Minorca*, and during all that time was invested with, and did exercise all the powers, privileges, and authorities, civil and military, belonging to the government of the said island of *Minorca*, in parts beyond the seas; and the said *Anthony*, before the said time when, &c. (to wit) on the said *first* of *September*, in the year aforesaid, at the island of *Minorca* aforesaid, was guilty of a riot, and was endeavouring to raise a mutiny among the inhabitants of the said island, in breach of the peace: whereupon the said *John* so being governor of the said island of *Minorca* as aforesaid, at the said time, when, &c. in order to preserve the peace and government of the said island, was obliged to, and did then and there order the said *Anthony* to be banished from the said island of *Minorca*; and in order to banish the said *Anthony*, did then and there gently lay hands upon the said *Anthony*, and did then and there seize and arrest him, and did

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Trespass
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Minorca, for
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committed
by him in
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keep and detain the said *Anthony*, before he could be banished from the said island, for a short space of time, (to wit) for the space of six days, then next following; and afterwards, to wit, on the 7th of *September*, in the year aforesaid, at *Minorca* aforesaid, did carry, and cause to be carried, the said *Anthony*, on board a certain vessel, from the island of *Minorca* aforesaid, to *Carthagera* aforesaid, as it was lawful for him to do, for the cause aforesaid; which are the same making the said assault upon the said *Anthony*, in the first count of the said declaration mentioned, and beating, and ill-treating him, and imprisoning him, and keeping and detaining him in prison for the said space of time, in the said first count of the said declaration mentioned, and compelling the said *Anthony* to depart from *Minorca* aforesaid, and carrying and causing to be carried the said *Anthony* from *Minorca* to *Carthagera*, in the dominions of the King of *Spain*, whereof the said *Anthony* has above complained against him, and this he is ready to verify; wherefore he prays judgment, &c. without this, that the said *John* was guilty of the said trespass, assault, and imprisonment, at the parish of *St. Mary le Bow*, in the ward of *Cheap*, or elsewhere, out of the said island of *Minorca* aforesaid. *Replication de injuria sua propria absq. tali causa.* At the trial the jury gave a verdict for the plaintiff, upon both issues, with 3000 *l.* damages, and 90 *l.* costs.

The substance of the evidence, as stated by the bill of exceptions, was as follows: On behalf of the plaintiff, that the defendant, at the island of *Minorca* on the 17th of *September* 1771, seized the plaintiff, and, without any trial, imprisoned him for the space of six days against his will, and banished him for the space of twelve months from the said island of *Minorca* to *Carthagera* in *Spain*. On behalf of the defendant; that the plaintiff was a native of *Minorca*, and at the time of seizing, imprisoning, and banishing him as aforesaid, was an inhabitant of and residing in the *Arraval* of *St. Phillip's*, in the said island; that *Minorca* was ceded to the Crown of *Great Britain*, by the treaty of *Utrecht*, in the year 1713. That the *Minorquins* are in general governed by the *Spanish* laws, but when it serves their purpose plead the *English* laws; that there are certain magistrates, called the *chief justice criminal*, and the *chief justice civil*, in the said island: that the said island is divided into four districts, exclusive of the *Arraval* of *St. Phillip's*; which the witness always understood to be separate and distinct from

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the others, and under the immediate order of the governor; so that no magistrate of *Mahon* could go there to exercise any function, without leave first had from the governor: that the *Arraval* of *St. Phillip's* is surrounded by a line wall on one side, and on the other by the sea, and is called the *Royalty*, where the governor has greater power than any where else in the island; and where the judges cannot interfere but by the governor's consent; that nothing can be executed in the *Arraval* but by the governor's leave, and the judges have applied to him the witness, for the governor's leave to execute process there. That for the trial of murder and other great offences committed within the said *Arraval*, upon application to the governor, he generally appoints the *assesseur criminal* of *Mahon*, and for lesser offences, the *mustapha*; and that the said *John Mostyn*, at the time of the seizing, imprisoning, and banishing the said *Anthony*, was the governor of the said island of *Minorca*, by virtue of certain letters patent of his present Majesty. Being so governor of the said island, he caused the said *Anthony* to be seized, imprisoned, and banished, as aforesaid, without any reasonable or probable cause, or any other matter alleged in his plea, or any act tending thereto.

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This case was argued this term, by Mr. *Buller*, for the plaintiff in error, and Mr. *Peckham*, for the defendant. Afterwards, in *Hilary Term* 1775, by Mr. Serjeant *Walker*, for the plaintiff, and Mr. Serjeant *Glynn*, for the defendant.

For the plaintiff in error. There are two questions, 1st, Whether in any case an action can be maintained in this country for an imprisonment committed at *Minorca*, upon a native of that place?

2dly. Supposing an action will lie against any other person, Whether it can be maintained against the governor, acting as such, in the peculiar district of the *Arraval* of *St. Phillip's*?

In the discussion of both these questions, the constitution of the island of *Minorca*, and of the *Arraval* of *St. Phillip's*, are material. Upon the record it appears, that by the treaty of *Utrecht*, the inhabitants had their own property and laws preserved to them. The record further states, that the *Arraval* of *St. Phillip's*, where the present cause of action arose, is subject to the immediate controul and order of the governor only, and that no judge of the island can execute any function there, without the particular leave of the governor for that purpose. 1st. If that be so, and the *Lex Loci* differs from the law of this country

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try; the *Lex Loci* must decide, and not the law of this country. The case of *Robinson versus Bland*, 2 Bur. 1078. does not interfere with this position; for the doctrine laid down in that case is, that where a transaction is entered into between *British* subjects, with a view to the law of *England*, the law of the place can never be the rule which is to govern. But where an act is done, as in this case, which by the law of *England* would be a crime, but in the country where it is committed, is no crime at all, the *Lex Loci* cannot be the rule. It was so held by Lord C. J. Pratt, in the case of *Pons versus Johnson*, and in a like case of *Ballister versus Johnson*, sittings after Trinity term 1765.

2d. In criminal cases, an offence committed in foreign parts, cannot, except by particular statutes, be tried in this country. 1st. *Vezey*, 246. The *East India Company versus Campbell*. If crimes committed abroad cannot be tried here, much less ought civil injuries, because the latter depend upon the police and constitution of the country where they occur, and the same conduct may be actionable in one country, which is justifiable in another. But in crimes, as murder, perjury, and many other offences, the laws of most countries take for their basis the law of God, and the law of nature; and therefore, though the trial be in a different country from that in which the offence was committed, there is a greater probability of distributing equal justice in such cases than in civil actions. In *Keilwey*, 202. it was held that the Court of *Chancery* cannot entertain a suit for dower in the *Ile of Man*, though it is part of the territorial dominions of the crown of *England*. 3d. The cases where the courts of *Westminster* have taken cognizance of transactions arising abroad, seem to be wholly on contracts, where the laws of the foreign country have agreed with the laws of *England*, and between *English* subjects; and even there it is done by a legal fiction; namely, by supposing under a *videlicet*, that the cause of action did arise within this country, and that the place abroad, lay either in *London* or in *Islington*. But where it appears upon the face of the record, that the cause of action did arise in foreign parts, there it has been held that the court has no jurisdiction. 2 *Lutw.* 946. Assault and false imprisonment of the plaintiff, at *Fort St. George*, in the *East Indies*, in parts beyond the seas; viz. at *London*, in the parish of *St. Mary le Bow*, in the ward of *Cheap*. It was resolved, by the whole court, that the declaration was ill, because the trespass

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pass is supposed to be committed at *Fort St. George*, in parts beyond the seas, *videlicet*, in *London*; which is repugnant and absurd: and it was said, by the chief justice, that if a bond bore date at *Paris*, in the kingdom of *France*, it is not triable here. In the present case, it does appear upon the record, that the offence complained of was committed in parts beyond the seas, and the defendant has concluded his plea with a traverse, that he was not guilty in *London*, in the parish of *St. Mary le Bow*, or elsewhere, out of the island of *Minorca*. Besides, it stands admitted by the plaintiff; because if he had thought fit to have denied it, he should have made a new assignment, or have taken issue on the place. Therefore as Justice *Dodderidge* says, in *Latch* 4. the court must take notice, that the cause of action arose out of their jurisdiction.

Before the statute of *Jeofails*, even in cases the most transitory, if the cause of action was laid in *London*, and there was a local justification, as at *Oxford*, the cause must have been tried at *Oxford*, and not in *London*. But the statute of *Jeofails* does not extend to *Minorca*: therefore this case stands entirely upon the common law; by which the trial is bad, and the verdict void.

The inconveniences of entertaining such an action in this country are many, but none can attend the rejecting it. For it must be determined by the law of this country, or by the law of the place where the act was done. If by our law, it would be the highest injustice, by making a man who has regulated his conduct by one law, amenable to another totally opposite. If by the law of *Minorca*, how is it to be proved? There is no legal mode of certifying it, no process to compel the attendance of witnesses, nor means to make them answer. The consequence would be to encourage every disaffected or mutinous soldier to bring actions against his officer, and to put him upon his defence without the power of proving either the law or the facts of his case.

II. Point. If an action would lie against any other person, yet it cannot be maintained against the Governor of *Minorca*, acting as such, within the *Arraval* of *St. Phillip's*.

The Governor of *Minorca*, at least within the district of *St. Phillip's*, is absolute: both the civil and criminal jurisdiction vest in him as the *supreme power*, and as such he is accountable to none but God. But supposing he were not absolute, in this case, the act complained of was done by him in a judicial capacity.

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capacity as criminal judge; for which no man is answerable, 1 Salk. 396. *Groenvelt versus Burwell*. 2 Mod. 218. *Show. Parl. cases* 24. *Dutton versus Howell*, are in point to this position; but more particularly the last case; where in trespass, assault, and false imprisonment, the defendant justified as Governor of *Barbadoes*, under an order of the council of state in *Barbadoes*, made by himself and the council, against the plaintiff (who was the deputy governor), for mal-administration in his office; and the House of Lords determined, that the action would not lie here. All the grounds and reasons urged in that case, and all the inconveniences pointed out against that action, hold strongly in the present. This is an action brought against the defendant for what he did as judge; all the records and evidence which relate to the transaction are in *Minorca*, and cannot be brought here; the laws there are different from what they are in this country; and as it is said in the conclusion of that argument, government must be very weak indeed, and the persons intrusted with it very uneasy, if they are subject to be charged with actions here, for what they do in that character in those countries. Therefore, unless that case can be materially distinguished from the present, it will be an authority, and the highest authority that can be adduced, to shew that this action cannot be maintained; and that the plaintiff in error is entitled to the judgment of the court.

Mr. Peckham, for the defendant in error. 1st. The objection to the jurisdiction is now too late; for wherever a party has once submitted to the jurisdiction of the court, he is for ever after precluded from making any objection to it. *Year book* 22. *H. 6. fol. 7. Co. Litt. 127. b. T. Raym. 34. 1 Mod. 81. 2 Mod. 273. 2 Lord Raym. 884. 2 Vern. 483.*

Secondly, An action of trespass can be brought in *England* for an injury done abroad. It is a transitory action, and may be brought any where. *Co. Litt. 282. 12 Co. 114. Co. Litt. 261. b.* where Lord Coke says, that an obligation made beyond seas, at *Bourdeaux* in *France*, may be sued here in *England*, in what place the plaintiff will. Captain *Parker* brought an action of trespass and false imprisonment against Lord *Clive* for injuries received in *India*, and it was never doubted but that the action did lie. And at this time there is an action depending between *Gregory Cojimaul* an *Armenian* merchant, and Governor *Verelst*, in which the cause of action arose in *Bengal*. A bill was filed by the Governor in the Exchequer for an injunction, which was granted:

granted; but on appeal to the House of Lords, the injunction was dissolved; therefore the supreme court of judicature, by dissolving the injunction, acknowledged that an action of trespass could be maintained in *England*, though the cause of action arose in *India*.

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Thirdly, There is no disability in the plaintiff which incapacitates him from bringing this action. Every person born within the allegiance of the King, though without the realm, is a natural born subject, and as such, is entitled to sue in the King's courts. *Co. Lit.* 129. The plaintiff, though born in a conquered country, is a subject, and within the allegiance of the King. 2 *Burr.* 858.

In 1 *Salk.* 404. upon a bill to foreclose a mortgage in the island of *Sarke*, the defendants pleaded to the jurisdiction, viz. that the island was governed by the laws of *Normandy*, and that the party ought to sue in the courts of the island, and appeal. But Lord Keeper *Wright* overruled the plea; "otherwise there might be a failure of justice if the chancery could not hold plea in such case, the party being here." In this case both the parties are upon the spot. In the case of *Ramkiffenseat v. Barker*, upon a bill filed against the representatives of the Governor of *Patna*, for money due to him as his Banyan; the defendant pleaded, that the plaintiff was an alien born, and an alien infidel, and, therefore, could have no suit here. But Lord *Hardwicke* said, "as the plaintiff's was a mere personal demand, it was extremely clear that he might bring a bill in this court;" and he overruled the defendant's plea without hearing one counsel on the other side.

The case of the Countess of *Derby*, *Keilwey*, 202, does not affect the present question; for that was a claim of dower, which is a local action, and cannot, as a transitory action, be tried anywhere. The other cases from *Latch* and *Lutwyche*, were either local actions, or questions upon demurrer; therefore not applicable to the case before the court; for a party may avail himself of many things upon a demurrer, which he cannot by a writ of error. The true distinction is between transitory and local actions; the former of which may be tried any where; the latter cannot, and this is a transitory action. But there is one case which more particularly points out the distinction, which is the case of *Mr. Skinner*, referred to the twelve judges from the council board. In the year 1657, when trade was open to the *East Indies*, he possessed himself of a house and warehouse, which he filled

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4th. point. It is contended that General *Mostyn* governs as all absolute sovereigns do, and that *set pro ratione voluntas* is the only rule of his conduct. From whom does the Governor derive this despotism? Not from the King, for the King has no such power, and, therefore, cannot delegate it to another. Many cases have been cited and much argument has been adduced, to prove that a man is not responsible in an action for what he has done as a judge; and the case of *Dutton v. Howell* has been much dwelt upon; but that case has not the least resemblance to the present. The ground of that decision was, that Sir *John Dutton* was acting with his council in a judicial capacity, in a matter of public accusation, and agreeable to the laws of *Barbadoes*, and only let the law take its course against a criminal. But Governor *Mostyn* neither sat as a military or as civil judge; he heard no accusation, he entered into no proof; he did not even see the prisoner; but in direct opposition to all laws, and in violation of the first principles of justice, followed no rule but his own arbitrary will, and went out of his way to persecute the innocent. If that be so, he is responsible for the injury he has done: and so was the opinion of the court of *C. B.* as delivered by Lord Chief Justice *De Grey* on the motion for a new trial. If the Governor had secured him, said his Lordship, nay, if he had barely committed him, that he might have been amenable to justice;

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justice; and if he had immediately ordered a prosecution upon any part of his conduct, it would have been another question; but the governor knew he could no more imprison him for a twelvemonth (and the banishment for a year is a continuation of the original imprisonment) than that he could inflict the torture. Lord *Bellamont's* case, 2 *Salk.* 625. *Paf.* 12 *W.* 3. is a case in point to shew that a governor abroad is responsible here: and the *stat.* 12 *W.* 3. passed the same year for making governors abroad amenable here in criminal cases, affords a strong inference that they were already answerable for civil injuries, or the legislature would at the same time have provided against that mischief. But there is a late decision not distinguishable from the case in question. *Comyn v. Sabine*, governor of *Gibraltar*, *Mich.* 11 *Geo.* 2. The declaration stated, that the plaintiff was a master carpenter of the office of ordnance at *Gibraltar*, that governor *Sabine* tried him by a court martial to which he was not subject, that he underwent a sentence of 500 lashes; and that he was compelled to depart from *Gibraltar*, which he laid to his damage of 10,000*l.* The defendant pleaded not guilty, and justified under the sentence of the court martial. There was a verdict for the plaintiff, with 700*l.* damages. A writ of error was brought, but the judgment affirmed.

With respect to the *Arraval* of *St. Philip's* being a peculiar district under the immediate authority of the governor alone, the opinion of Lord Chief Justice *de Grey* upon the motion for a new trial is a complete answer: "One of the witnesses in the
" cause (said his Lordship) represented to the jury, that in some
" particular cases, especially in criminal matters, the governor
" resident upon the island does exercise a legislative power. It
" was gross ignorance in that person to imagine such a thing; I
" may say it was impossible, that a man who lived upon the
" island in the station he had done, should not know better,
" than to think that the governor had a civil and criminal power
" in him. The governor is the king's servant; his commission
" is from him, and he is to execute the power he is invested with
" under that commission; which is, to execute the laws of
" *Minorca*, under such regulations as the King shall make in
" council. It was a vain imagination in the witnesses to say,
" that there were five terminos in the island of *Minorca*; I have
" at various times, seen a multitude of authentic documents
" and papers relative to that island, and I do not believe that in
" any one of them, the idea of the *Arraval* of *St. Phillip's* being
" a distinct

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" a distinct jurisdiction, was ever started. *Mahon* is one of the
 " four terminos, and St. *Philip's* and all the district about it,
 " is comprehended within that termino; but to suppose that there
 " is a distinct jurisdiction, separate from the government of the
 " island, is ridiculous and absurd." Therefore, as the defendant
 by pleading in chief, and submitting his cause to the decision of an
English jury, is too late in his objection to the jurisdiction of the
 court; as no disability incapacitates the plaintiff from seeking
 redress here; and as the action which is a transitory one is clearly
 maintainable in this country, though the cause of action arose
 abroad, the judgment ought to be affirmed. Should it be reversed,
 I fear the public, with too much truth, will apply the lines of the
 Roman Satyrist on the drunken *Marius* to the present occasion;
 and they will say of governor *Mostyn*, as was formerly said of him,
Hic est damnatus inani judicio;
 and to the *Minorquins*, if Mr. *Fabrigas* should be deprived of
 that satisfaction in damages which the jury gave him,

At tu victrix provincia ploras.

LORD MANSFIELD.—Let it stand for another argument. It has
 been extremely well argued on both sides.

On *Friday 27th January, 1775*, it was very ably argued by
 Mr. Serjeant *Glynn*, for the plaintiff, and by Mr. Serjeant
Walker for the defendant.

LORD MANSFIELD.—This is an action brought by the plaintiff
 against the defendant, for an assault and false imprisonment; and
 part of the complaint made being for banishing him from the
 Island of *Minorca* to *Carthagen* in *Spain*, it was necessary for
 the plaintiff, in his declaration, to take notice of the real place
 where the cause of action arose: therefore, he has stated it to be
 in *Minorca*; with a *videlicet*, at *London*, in the parish of St.
Mary le bow, in the ward of *Cheap*. Had it not been for that
 particular requisite, he might have stated it to have been in the
 County of *Middlesex*. To this declaration the defendant put in
 two pleas. *First*, "not guilty;" *secondly*, that he was governor
 of *Minorca* by letters patent from the crown; that the plaintiff
 was raising a sedition and mutiny; and that in consequence of
 such sedition and mutiny, he did imprison him, and send him
 out of the island; which as governor, being invested with all
 the privileges, rights, &c. of governor, he alleges he had a
 right to do. To this plea the plaintiff does not demur, nor does
 he deny that it would be a justification in case it were true: but
 he denies the truth of the *fact*, and puts in issue whether the

fact

fact of the plea is true. The plea avers that the assault for which the action was brought arose in the island of *Minorca*, out of the realm of *England* and no where else. To this the plaintiff has made no new assignment, and therefore by his replication he admits the *locality* of the cause of action.

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Thus it stood on the pleadings. At the trial the plaintiff went into the evidence of his case, and the defendant into evidence of his; but on behalf of the defendant, evidence different from the facts alleged in this plea of justification was given, to shew that the *Arraval* of *St. Phillips*, where the injury complained of was done, was not within either of the four precincts, but is a district of itself more immediately under the power of the governor; and that no judge of the island can exercise jurisdiction there, without a special appointment from him. Upon the facts of the case the judge left it to the jury, who found a verdict for the plaintiff, with 3,000*l.* damages. The defendant has tendered a bill of exceptions, upon which bill of exceptions the cause comes before us: and the great difficulty I have had upon both the arguments, has been to be able clearly to comprehend what the question is, which is meant seriously to be brought before the court.

If I understand the counsel for governor *Mostyn* right; what they say is this: The plea of not guilty is totally immaterial; and so is the plea of justification: because upon the plaintiff's own shewing it appears, 1st, that the cause of action arose in *Minorca*, out of the realm; 2dly, that the defendant was governor of *Minorca*, and by virtue of such his authority imprisoned the plaintiff. From thence it is argued, that the judge who tried the cause ought to have refused any evidence whatsoever, and to have directed the jury to find for the defendant: and three reasons have been assigned. One, insisted upon in the former argument, was, that the plaintiff, being a *Minorquin*, is incapacitated from bringing an action in the King's courts in *England*. To dispose of that objection at once, I shall only say, it is wisely abandoned to day; for it is impossible there ever could exist a doubt, but that a subject born in *Minorca* has as good a right to appeal to the King's courts of justice, as one who is born within the sound of *Bow* bell: and the objection made in this case, of its not being stated on the record that the plaintiff was born since the treaty of *Utrecht*, makes no difference. The two other grounds are, 1st. That the defendant being governor of *Minorca*, is answerable for no injury whatsoever done by him in that capacity. 2dly, That the injury being done at *Minorca*, out of the realm, is not

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not cognizable by the King's courts in *England*.—As to the first, nothing is so clear as that to an action of this kind the defendant if he has any justification must plead it; and there is nothing more clear, than that if the court has not a *general jurisdiction* of the subject-matter, he must *plead* to the *jurisdiction*, and cannot take advantage of it upon the *general issue*. Therefore by the law of *England*, if an action be brought against a judge of record for an act done by him in his judicial capacity, he may plead that he did it as judge of record, and that will be a complete justification. So in this case, if the injury complained of had been done by the defendant as a judge, though it arose in a foreign country where the technical distinction of a court of record does not exist, yet sitting as a judge in a court of justice, subject to a superior review, he would be within the reason of the rule which the law of *England* says shall be a justification; but then it must be pleaded. Here no such matter is pleaded, nor is it even in evidence that he sat as judge of a court of justice. Therefore I lay out of the case every thing relative to the *Arraval* of *St. Phillip's*.

The first point then upon this ground is, the *sacredness* of the defendant's person as *governor*. If it were true that the law makes him that sacred character, he must plead it and set forth his commission as special matter of justification; because *prima facie* the court has jurisdiction. But I will not rest the answer upon that only. It has been insisted by way of distinction, that supposing an action will lie for an injury of this kind committed by one individual against another, in a country beyond the seas, but within the dominion of the crown of *England*, yet it shall *not emphatically* lie against the governor. In answer to which I say, that for many reasons, if it did not lie against any other man, it shall *most emphatically* lie against the governor.

In every plea to the jurisdiction, you must state another jurisdiction; therefore, if an action is brought here for a matter arising in *Wales*, to bar the remedy sought in this court, you must shew the jurisdiction of the court of *Wales*; and in every case to repel the jurisdiction of the King's court, you must shew a more proper and more sufficient jurisdiction: for if there is no other mode of trial, that alone will give the King's courts a jurisdiction. Now in this case no other jurisdiction is shewn, even so much as in argument. And if the King's courts of justice cannot hold plea in such case, no other court can do it. For it is truly said that a governor is in the nature of a viceroy; and therefore *locally*, *during his government*, no civil or criminal action will lie against

him : the reason is because upon process he would be subject to imprisonment. But here, the injury is said to have happened in the *Arrival* of *St. Phillip's*, where without his leave no jurisdiction can exist. If that be so, there can be no remedy whatsoever, if it is not in the King's courts : because when he is out of the government, and is returned with his property into this country, there are not even his effects left in the island to be attached.

Another very strong reason, which was alluded to by Mr. Serjeant *Glynn*, would alone be decisive ; and it is this : that though the charge brought against him is for a *civil* injury, yet it is likewise of a *criminal* nature ; because it is in *abuse* of the authority delegated to him by the *King's Letters Patent*, under the great seal. Now if every thing committed within a dominion is triable by the courts within that dominion, yet the effect or extent of the *King's Letters Patent*, which gave the authority, can only be tried in the King's courts ; for no question concerning the Seignory, can be tried within the Seignory itself. Therefore where the question respecting the Seignory arises in the proprietary governments, or between two provinces of *America*, or in the Isle of *Man*, it is cognizable by the King's courts in *England* only. In the case of the isle of *Man* * it was so decided in the time of *Queen Elizabeth*, by the chief justice and many of the judges. So that *emphatically* the governor must be tried in *England*, to see whether he has exercised the authority delegated to him by the *Letters Patent* legally and properly ; or whether he has abused it in violation of the laws of *England*, and the trust so reposed in him.

It does not follow from hence, that let the cause of action arise where it may, a man is not entitled to make use of every justification his case will admit of, which ought to be a defence to him. If he has acted right according to the authority with which he is invested, he must lay it before the court by way of plea, and the court will exercise their judgment whether it is a sufficient justification or not. In this case, if the justification had been proved, the court might have considered it as a sufficient answer ; and, if the nature of the case would have allowed of it, might have adjudged, that the raising a mutiny was a good ground for such a summary proceeding. I can conceive cases in time of war in which a governor would be justified, though he acted very arbitrarily, in which he could not be justified in time of peace. Suppose, during a siege or upon an

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*4 Inst. 284.

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* *Feaubert*
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invasion of *Minorca*, the governor should judge it proper to send an hundred of the inhabitants out of the island from motives of *real and genuine expediency*; or suppose upon a general suspicion he should take people up as spies; upon proper circumstances laid before the court, it would be very fit to see whether he had acted as the governor of a garrison ought, according to the circumstances of the case. But it is objected, supposing the defendant to have acted as the *Spanish* governor was empowered to do before, how is it to be known here that by the laws and constitution of *Spain* he was authorized so to act. The way of knowing foreign laws is, by admitting them to be proved as *facts*, and the court must assist the jury in ascertaining what the law is. For instance, if there is a *French* settlement the construction of which depends upon the custom of *Paris*, witnesses must be received to explain what the custom is; as evidence is received of customs in respect of trade. There is a case of the kind I have just stated *. So in the supreme resort before the King in Council, the Privy Council determines all cases that arise in the plantations, in *Gibraltar*, or *Minorca*, in *Jersey*, or *Guernsey*; and they inform themselves, by having the law stated to them.—As to suggestions with regard to the difficulty of bringing witnesses, the court must take care that the defendant is not surprised, and that he has a fair opportunity of bringing his evidence, if it is a case proper in other respects for the jurisdiction of the court. There may be some cases arising abroad, which may not be fit to be tried here; but that cannot be the case of a governor, injuring a man contrary to the duty of his office, and in violation of the trust reposed in him by the King's commission.

If he wants the testimony of witnesses whom he cannot compel to attend, the court may do what this court did in the case of a criminal prosecution of a woman who had received a pension as an officer's widow: and it was charged in the indictment, that she was never married to him. She alleged a marriage in *Scotland*, but that she could not compel her witnesses to come up, to give evidence. The court obliged the prosecutor to consent that the witnesses might be examined before any of the judges of the court of session, or any of the barons of the court of exchequer in *Scotland*, and that the depositions so taken should be read at the trial. And they declared, that they would have put off the trial of the indictment from time to time, for ever, un-

less the prosecutor had so consented. The witnesses were so examined before the Lord President of the court of session.

It is a matter of course in aid of a trial at law, to apply to a court of equity, for a commission and injunction in the mean time; and where a real ground is laid, the court will take care that justice is done to the defendant as well as to the plaintiff. Therefore, in every light in which I see the subject, I am of opinion that the action holds *emphatically* against the *governor*, if it did not hold in the case of any other person. If so, he is accountable in this court or he is accountable no where; for the king in council has no jurisdiction. Complaints made to the King in council tend to remove the governor, or to take from him any commission, which he holds during the pleasure of the crown. But if he is in *England*, and holds nothing at the pleasure of the crown, they have no jurisdiction to make reparation, by giving damages, or to punish him in any shape for the injury committed. Therefore to lay down in an *English* court of justice such a monstrous proposition, as that a governor acting by virtue of letters patent under the great seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect his Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained.

In Lord *Bellamont's* case, 2 *Salk.* 625. cited by Mr. *Peckham*, a motion was made for a trial at bar, and granted, because the *Attorney General* was to defend it on the part of the King; which shews plainly that such an action existed. And in *Way* versus *Yally*, 6 *Mod.* 195. Justice *Powell* says, that an action of false imprisonment has been brought here against a governor of *Jamaica*, for an imprisonment there, and the laws of the country were given in evidence. The governor of *Jamaica* in that case never thought that he was not amenable. He defended himself, and possibly shewed, by the laws of the country, an act of the assembly which justified that imprisonment, and the court received it as they ought to do. For whatever is a justification in the place where the thing is done, ought to be a justification where the cause is tried.—I remember, early in my time, being counsel in an action brought by a carpenter in the train of artillery, against governor *Sabine*, who was governor of *Gibraltar*, and who had barely confirmed the sentence of a court-martial, by which the plaintiff had been tried, and sentenced to be whipped. The governor was very ably defended, but nobody ever thought that the action would not lie; and it
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1774. being proved at the trial, that the tradesmen who followed the train, were not liable to martial law; the court were of that opinion, and the jury accordingly found the defendant guilty of the trespass, as having had a share in the sentence; and gave 500 *l.* damages.

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The next objection which has been made, is a general objection, with regard to the matter arising abroad; namely, that as the cause of action arose abroad, it cannot be tried here in *England*.

There is a *formal* and a *substantial* distinction as to the *locality* of trials. I state them as different things: the *substantial* distinction is, where the proceeding is *in rem*, and where the effect of the judgment cannot be had, if it is laid in a wrong place. That is the case of all ejections, where possession is to be delivered by the *sheriff* of the *county*; and as trials in *England* are in particular counties, the officers are county officers; therefore the judgment could not have effect, if the action was not laid in the proper county.

With regard to matters that arise *out of the realm*, there is a *substantial* distinction of locality too; for there are some cases that arise out of the realm, which ought not to be tried any where but in the country where they arise; as in the case alluded to, by Serjeant *Walker*: if two persons fight in *France*, and both happening casually to be here, one should bring an action of assault against the other, it might be a doubt whether such an action could be maintained here: because, though it is not a criminal prosecution, it must be laid to be against the peace of the King; but the breach of the peace is merely local, though the trespass against the person is transitory. Therefore, without giving any opinion, it might perhaps be triable only where both parties at the time were subjects. So if an action were brought relative to an estate in a foreign country, where the question was a matter of title only, and not of damages, there might be a solid distinction of locality.

But there is likewise a *formal* distinction, which arises from the mode of trial: for trials in *England* being by jury, and the kingdom being divided into counties, and each county considered as a separate district or principality, it is absolutely necessary that there should be some county where the action is brought in particular, that there may be a process to the sheriff of that county, to bring a jury from thence to try it. This matter of form goes to all cases that arise abroad: but the law makes a distinction between *transitory* actions and *local* actions. If the

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matter which is the cause of a transitory action arises within the realm, it may be laid in any county, the place is not material; and if an imprisonment in *Middlesex* it may be laid in *Surrey*, and though proved to be done in *Middlesex*, the place not being material, it does not at all prevent the plaintiff recovering damages: the place of transitory actions is never material, except where by particular acts of parliament it is made so; as in the case of churchwardens and constables, and other cases which require the action to be brought in the county. The parties, upon sufficient ground, have an opportunity of applying to the court in time to change the *venue*; but if they go to trial without it, that is no objection. So all actions of a transitory nature that arise abroad may be laid as happening in an *English* county. But there are occasions which make it absolutely necessary to state in the declaration, that the cause of action really happened abroad; as in the case of specialties, where the date must be set forth. If the declaration states a specialty to have been made at *Westminster* in *Middlesex*, and upon producing the deed, it bears date at *Bengal*, the action is gone; because it is such a *variance* between the deed and the declaration as makes it appear to be a *different* instrument. There is some confusion in the books upon the *stat. 6 Ric. 2.* But I do not put the objection upon that statute. I rest it singly upon this ground. If the true date or description of the bond is not stated, it is a *variance*. But the law has in that case invented a fiction; and has said, the party shall first set out the description truly, and then give a *venue* only for form, and for the sake of trial, by a *videlicet*, in the county of *Middlesex*, or any other county. But no judge ever thought that when the declaration said in *Fort St. George*, *viz.* in *Cheapside*, that the plaintiff meant it was in *Cheapside*. It is a *fiction of form*; every country has its forms, which are invented for the furtherance of justice; and it is a certain rule, that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted. Now the fiction invented in these cases is barely for the mode of trial; to every other purpose, therefore, it shall be contradicted, but not for the purpose of saying the cause shall not be tried. So in the case that was long agitated and finally determined some years ago, upon a fiction of the *teste* of writs taken out in the vacation, which bear date as of the last day of the term, it was held, that the fiction shall not be contradicted so as to invalidate the writ, by averring that it issued on a day in the vacation*: because the fiction was invented for the

Fictions of law shall never be contradicted so as to defeat the end for which they were invented; but for every other purpose they may be contradicted.

* 2 Burr.
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furtherance of justice, and to make the writ appear right in form. But where the *true* time of suing out a *latitat* is *material*, as on a plea of *non assumpsit infra sex annos*, there it may be *shewn* that the *latitat* was sued out *after* the six years notwithstanding the *teste*. I am sorry to observe, that some sayings have been alluded to, inaccurately taken down, and improperly printed, where the court has been made to say, that as men they have one way of thinking, and as judges they have another, which is an absurdity; whereas in fact they only meant to support the fiction. I will mention a case or two to shew that that is the meaning of it.

In 6 *Mod.* 228. the case of *Roberts v. Harnage* is thus stated: the plaintiff declared that the defendant became bound to him at *Fort St. David's* in the *East Indies* at *London*, in such a bond; upon demurrer the objection was, that the bond appeared to have been sealed and delivered at *Fort St. David's* in the *East Indies*, and, therefore, the date made it local, and, by consequence, the declaration ought to have been of a bond made at *Fort St. David's*, in the *East Indies*, viz. at *Islington*, in the county of *Middlesex*; or in such a ward or parish in *London*, and of that opinion was the whole court. This is an inaccurate state of the case. But in 2 *Lord Raym.* 1,042. it is more truly reported, and stated as follows: it appeared by the declaration, that the bond was made at *London* in the ward of *Cheap*; upon oyer, the bond was set out, and it appeared upon the face of it to be dated at *Fort St. George* in the *East Indies*; the defendant pleaded the variance in abatement, and the plaintiff demurred, and it was held bad: but the court said that it would have been good, if laid at *Fort St. George*, in the *East Indies*, to wit, at *London*, in the ward of *Cheap*. The objection there was, that they had laid it falsely; for they had laid the bond as made at *London*; whereas, when the bond was produced, it appeared to be made at another place, which was a variance. A case was quoted from *Latch*, and a case from *Lutwyche*, on the former argument, but I will mention a case posterior in point of time, where both those cases were cited, and no regard at all paid to them; and that is the case of *Parker and Crook*, 10 *Mod.* 255. It was an action of covenant upon a deed indented; it was objected to the declaration, that the defendant is said in the declaration to continue at *Fort St. George*, in the *East Indies*; and upon the oyer of the deed it bore date at *Fort St. George*, and, therefore, the court, as was pretended, had no jurisdiction: *Latch*, fol. 4. *Lutwyche*, 950. Lord Chief Justice *Parker* said, that an action will lie in *England* upon
a deed

a deed dated in foreign parts; or else the party can have no remedy; but then in the declaration a place in *England* must be alleged *pro forma*. Generally speaking, the deed, upon the oyer of it, must be consistent with the declaration; but in these cases, *propter necessitatem*, if the inconsistency be as little as possible, it is not to be regarded; and here the contract being of a voyage which was to be performed from *Fort St. George* to *Great Britain*, does import, that *Fort St. George* is different from *Great Britain*; and after taking time to consider of it in *Hilary* term, the plaintiff had his judgment, notwithstanding the objection. Therefore the whole amounts to this; that where the action is substantially such a one as the court can hold plea of, as the mode of trial is by jury, and as the jury must be called together by process directed to the sheriff of the county; matter of form is added to the fiction, to say it is in that county, and then the whole of the inquiry is, Whether it is an action that ought to be maintained. But can it be doubted, that actions may be maintained here, not only upon contracts, which follow the persons, but for injuries done by subject to subject; especially for injuries where the whole that is prayed is a reparation in damages, or satisfaction to be made by process against the person or his effects, within the jurisdiction of the court? We know it is within every day's experience. I was embarrassed a great while to find out whether the counsel for the plaintiff really meant to make a question of it. In sea batteries the plaintiff often lays the injury to have been done in *Middlesex*, and then proves it to be done a thousand leagues distant on the other side of the *Atlantic*. There are cases of offences on the high seas, where it is of necessity to lay in the declaration, that it was done upon the high seas; as the taking a ship. There is a case of that sort occurs to my memory; the reason I remember it is, because there was a question about the jurisdiction. There likewise was an action of that kind before Lord Chief Justice *Lee*, and another before me, in which I quoted that determination, to shew, that when the Lords Commissioners of prizes have given judgment, that is conclusive in the action; and likewise when they have given judgment, it is conclusive as to the costs, whether they have given costs or not. It is necessary in such actions to state in the declaration, that the ship was taken, or seized *on the high seas; videlicet, in Cheapside*. But it cannot be seriously contended that the judge and jury who try the cause, fancy the ship is sailing in *Cheapside*: no, the plain sense of it is, that as an action

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lies in *England* for the ship which was taken on the high seas, *Cheapside* is named as a *venue*; which is saying no more, than that the party prays the action may be tried in *London*. But if a party were at liberty to offer reasons of fact contrary to the truth of the case, there would be no end of the embarrassment. At the last sittings there were two actions brought by *Armenian* merchants, for assaults and trespasses in the *East Indies*, and they are very strong authorities. Serjeant *Glynn* said, that the defendant *Mr. Verelst* was very ably assisted: so he was, and by men who would have taken the objection, if they had thought it maintainable, and the actions came on to be tried after this case had been argued once; yet the counsel did not think it could be supported. *Mr. Verelst* would have been glad to make the objection; he would not have left it to a jury, if he could have stopped them short, and said, you shall not try the actions at all. I have had some actions before me, rather going further than these transitory actions; that is, going to cases which in *England* would be local actions: I remember one, I think it was an action brought against Captain *Gambier*, who by order of Admiral *Boscawen* had pulled down the houses of some sutlers who supplied the navy and sailors with spirituous liquors; and whether the act was right or wrong, it was certainly done with a good intention on the part of the admiral, for the health of the sailors was affected by frequenting them. They were pulled down: the captain was inattentive enough to bring the sutler over in his own ship, who would never have got to *England* otherwise; and as soon as he came here he was advised that he should bring an action against the captain. He brought his action, and one of the counts in the declaration was for pulling down the houses. The objection was taken to the count for pulling down the houses; and the case of *Skinner* and the *East-India* company was cited in support of the objection. On the other side, they produced from a manuscript note a case before Lord Chief Justice *Eyre*, where he over-ruled the objection; and I over-ruled the objection upon this principle, namely, that the reparation here was personal, and for damages, and that otherwise there would be a failure of justice; for it was upon the coast of *Nova-Scotia*, where there were no regular courts of judicature: but if there had been, Captain *Gambier* might never go there again; and, therefore, the reason of locality in such an action in *England* did not hold. I quoted a case of an injury of that sort in the *East Indies*, where even in a court of equity Lord *Hardwicke* had directed satisfaction to be made in damages: that case before

Lord

Lord *Hardwicke* was not much contested, but this case before me was fully and seriously argued, and a thousand pounds damages given against captain *Gambier*. I do not quote this for the authority of my opinion, because that opinion is very likely to be erroneous, but I quote it for this reason; a thousand pounds damages and the costs were a considerable sum. As the captain had acted by the orders of Admiral *Boscawen*, the representatives of the admiral defended the cause, and paid the damages and costs recovered. The case was favourable; for what the admiral did was certainly well intended; and yet there was no motion for a new trial.

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I recollect another cause that came on before me; which was the case of Admiral *Palliser*. There the very gist of the action was local: It was for destroying fishing huts upon the *Labrador* coast. After the treaty of *Paris*, the *Canadians* early in the season erected huts for fishing; and by that means got an advantage, by beginning earlier, of the fishermen who came from *England*. It was a nice question upon the right of the *Canadians*. However the admiral from general principles of policy ordered these huts to be destroyed. The cause went on a great way. The defendant would have stopped it short at once, if he could have made such an objection, but it was not made. There are no local courts among the *Esquimaux Indians* upon that part of the *Labrador* coast; and therefore whatever any injury had been done there by any of the King's officers would have been altogether without redress, if the objection of locality would have held. The consequence of that circumstance shews, that where the reason fails, even in actions which in *England* would be local actions, yet it does not hold to places beyond the seas within the King's dominions. Admiral *Palliser's* case went off upon a proposal of a reference, and ended by an award. But as to transitory actions, there is not a colour of doubt but that every action that is transitory may be laid in any county in *England*, though the matter arises beyond the seas; and when it is absolutely necessary to lay the truth of the case in the declaration, there is a fiction of law to assist you, and you shall not make use of the truth of the case against that fiction, but you may make use of it to every other purpose. I am clearly of opinion not only against the objections made, but that there does not appear a question upon which the objections could arise.

The three other judges concurred.

Per Cur. Judgment affirmed.

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SMITH

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Friday,
Nov. 18th.

A post-master is bound to deliver all letters to the several inhabitants within a post town or place at their respective places of abode, at the rate of postage only as established by act of parliament.

SMITH *versus* POWDICH.

THIS was an action for money had and received: Plea *non assumpsit*, and issue thereupon. At the trial the jury found a special verdict; the material facts of which were as follow: That the plaintiff *Smith* was an inhabitant of the town of *Hungerford*, and his place of residence well known to the defendant *Powdich*. That *Powdich* was deputy post-master for the town of *Hungerford* under the appointment of the post-master general: that before and from the making the *stat. 9th Anne*, for regulating the postage of letters, the deputy post-master had been used to receive *one penny* over and *above* the usual rate of postage from every inhabitant of the said town, for every letter directed and *delivered* to the said inhabitants at their respective places of *abode*, or a recompence by the year, or proportionably for a less time in lieu thereof; except when any inhabitant has refused to pay the recompence for his delivery at the place of abode, in which case the post-master for the time being hath kept at the said post-office, ready to be delivered when called for, the letters of every such inhabitant so refusing as aforesaid; and except in the instance of *one* family in the said town, who refused to pay the additional penny above the rate of postage fixed by act of parliament, and to whom letters were for five years afterwards delivered at their place of abode for the legal rate of postage only; which family at the end of such five years, the post-master being changed, paid the additional penny. That on 3d *Jan.* 1774, the plaintiff gave notice to the defendant that he would not pay more than the rate of postage fixed by act of parliament for any letter brought to the said office for him, and if the defendant did not deliver such letter at the place of abode of the said plaintiff, or received any sum above such rate of postage, he would commence an action against him. That on the 5th *Jan.* 1774 the defendant *Powdich* carried a letter directed to the plaintiff at his place of abode in *Hungerford*, but *refused* to deliver it unless the plaintiff would pay an additional penny over and above the postage, but was willing to deliver it at the post-office for the postage only; that after tender by the plaintiff of the postage only, and a refusal by the defendant, he submitted to pay the additional penny. The jury further found that this demand if legal was a reasonable demand; but whether it was so or not they prayed the opinion of the court,

Mr.

Mr. Buller for the plaintiff. The question submitted upon this record for the opinion of the court is, Whether the deputy post-master of *Hungerford* is bound to deliver letters to the several inhabitants of *Hungerford*, to whom they are directed, at their respective places of abode, at the several rates of postage established by act of parliament; or whether he may at his option demand and take any thing more?

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This question depends upon the construction of the several acts of parliament relative to the postage of letters, and not on any usage of a particular place, for no usage can operate contrary to the exprefs provisions of an act of parliament. The several statutes 9 *Ann. c. 10.* 4th *Geo. 2. c. 33.* 5 *Geo. 3. c. 25.* expressly provide for the *delivery* as well as the *conveyance* of letters; and it was necessary they should do so, on account of the great inconvenience and almost impracticability of every person fetching their own letters. In *stat. 9 Ann. c. 10. sect. 39.* it is provided that after the 1st of *June 1743* the old rates should be revived and paid, for the carriage, conveyance, and *delivery* of all letters, &c. By the 4 *Geo. 2. c. 33.* made for the purpose of obviating a doubt concerning the allowance made, upon the delivery of letters sent by the penny-post office beyond the limits then allowed by act of parliament; it is enacted that such allowance of a penny may be legally taken upon the delivery of every letter, originally sent by the penny-post, and not first passing by the general post, and from thence transmitted to the penny-post; over and above the penny upon putting such letter into the penny-post. The exception in this act, of letters sent by the general post, shews clearly, that no allowance whatever is to be added to the rate of postage on account of delivery.

The *stat. 9 Ann. c. 10. s. 16.* provides an additional allowance of a penny for letters delivered from on ship-board to the post-office: that clause therefore is negatively a declaration that it shall not be taken in any other case.

Again, the *stat. 5 G. 3. c. 25. sect. 4.* speaks of the *limits of delivery*; and directs that a *penny extra* shall be paid for all ship letters directed to places within the limits of the delivery of letters by the deputy post-master. There can be no doubt therefore under these acts but that the post-master is bound to deliver the letters; but the question made by the defendant is, Whether he is bound to deliver them to the several inhabitants *within the post-town* at their respective *houses*, or only at the post-office appointed for the reception of the mail? It is clear it must

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Next as to authorities: The case of *Barnes v. Foley*, Hil. 8 Geo. 3. 1768. R. B. has decided that the post-master cannot demand or receive any thing for the delivery of letters within the post-town, beyond the legal rate of postage. In *Stock v. Harris*, East. 11 G. 3. R. B. it was adjudged that the post-master was entitled to nothing more for the delivery of a letter than the usual rate of postage.

* Since reported in 2 Blackst. Rep. 906.

But in *Rowning v. Goodchild*, Trin. 13 Geo. 3. C. B.* the general question came before the court, and is decisive in favour of the plaintiff in this case. It was an action against the deputy post-master of *Ipswich* for not delivering the plaintiff's letters at his place of abode at *Ipswich*, but on the contrary detaining them, &c. Upon not guilty pleaded, the jury found a verdict for the plaintiff, subject to the opinion of the court on a case stated. The question was, Whether the defendant was obliged to deliver the letters to the inhabitants of *Ipswich* at their places of abode. Lord Chief Justice *de Grey* delivered the opinion of the court.

This question depends upon the construction of the *stat. 9 Ann. c. 10* and the only consideration is, What is meant by the word *delivery*? That is, Whether the post-master is obliged to deliver the letters to the inhabitants at their respective places of abode; or, Whether it is sufficient if the letters are delivered to them at the post-office. By *sect. 2.* it appears that the duty of the post-master consists in three articles, namely, receiving, carrying, and delivering letters; by the same *sect.* he is empowered to fix as many stages as he thinks fit for that purpose. Therefore as the term carrying implies a place and person to whom they are to be carried, the term delivering implies a place and person to whom they are to be delivered. But the mere quitting of the custody of a letter does not answer the idea of the word *delivery*, nor indeed can the post-master general, by sending a letter from his office in *London* to his office at *Ipswich*, be said to quit the possession, it is only a continuation of the custody of it. His Lordship compared this 2d *sect.* with *sect. 40.* which provides against the detaining any letter: with *sect. 39.* where the delivery as well as the conveyance is named in fixing the postage: with *sect. 30.* which gives a summary jurisdiction in case of any person to whom a letter is delivered refusing to pay the postage: and he likewise

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likewise cited the *stat. 5 G. 3. c. 25. stat. 4 G. 2. c. 33.* and concluded that from a comparison of all the acts on the subject which were uniform and consistent with each other, it was clear the legislature meant by delivery, a delivery to the person at his place of abode. That the usage in *London*, and other great commercial towns, as *York* and *Bristol*, was agreeable to this construction, and that the same rule must take place throughout the kingdom. The case therefore of *Rowning v. Goodchild* is decisive of the question. But there are two particular facts found by this special verdict which are material. 1st. That the post-master acquiesced in delivering letters to one family, at the legal rate of postage, for five years. 2dly, That the post-master demanded this additional penny, which in the case of *Barnes v. Foley* it was settled he had no right to do; for he cannot impose a general tax.

Mr. *Mansfield* for the defendant. With respect to the last objection, if it were to prevail, it would evade the greater question intended to be decided by this special verdict, which is framed so as to take the sense of the court upon the general question: and as to the acquiescence of the post-master in the particular case mentioned, it is found that every other person except that particular family has been content to pay the additional penny from the first establishment of the post at *Hungerford* to the present time. It is further found that this extraordinary payment is a reasonable sum for the labour of the post-master in delivering letters at the houses of the respective inhabitants, unless he is bound to deliver them at the legal rate of postage only.

The legality of this payment turns upon these two grounds. 1st. That something is understood under the word "*delivery*;" and 2dly, That there is no prohibition against taking a consideration for the delivery of letters in post towns.

First, as to the limits of delivery, it is plain from the words of the *stat. 5 G. 3. c. 25. sect. 4.* that limits of delivery mean the whole of a particular district adjacent to a post-town, at which post town letters for the inhabitants of such district are directed to be left. If that be the true construction, even the *Orkneys* are within the limits of delivery. Every place in *England* is within the limits of some delivery or other; therefore no argument to shew that delivery means a delivery at the place of abode can be drawn from the expression "*limits of delivery*." But the words may be as well satisfied by a delivery at the post-office. If not, the whole revenue would not suffice for the expence of delivery

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delivery at the respective place of abode of every inhabitant within each particular district.

Secondly, There is no prohibition against taking a consideration above the legal rate of postage for the delivery of letters in post-towns.

The prohibitory clause in the *stat. 9 Ann. c. 10. sect. 17.* has in view only the general carriage of letters upon post-roads, not within post-towns, otherwise the argument would be as strong to oblige the post-master to fetch letters to the post-office, as to deliver them at each person's house, for it equally restrains persons from carrying letters to the post-office, as from it.

It appears by the journals of the House of Commons, that a clause which was inserted to prohibit the taking more than the legal postage in post-towns was rejected.

The *stat. 9 Ann. c. 10. sect. 5.* which fixes the several rates of postage, does not mention the word delivery, but only postage and conveyance, therefore it only means carrying from stage to stage, not from one part of the town to another.

As to *sect. 40.* against opening or detaining any letter except for want of a true direction, or where the party cannot be found, the legislature could never mean to oblige the post-master to inquire at every house in a village or district before he returned the letter, but only that he should not wilfully delay or embezzle it.

With respect to the penny allowed by the *stat. 5 G. 3. c. 25. sect. 4.* for the delivery of letters coming from on board a ship, this provision was only to supply the loss of dead letters never inquired after. And therefore does not afford the negative inference contended for,

The usage throughout the kingdom is greatly in favour of the present claim; for out of 357 post-towns 281 have constantly paid a compensation for the delivery of letters, and the complete answer to the inconvenience of people attending to fetch their own letters is, that it is chimerical and visionary, for it never has, and never will happen.

Lord Mansfield. What answer do you give to the case of *Rowning v. Goodchild*?

Mr. Mansfield. The judgment in that case was given upon the particular state and circumstances of it; and the court thought that the post-master could not vary the usage after the year 1741, which had been practised before the year 1741: but they did

not

not decide that in all cases the post-master was obliged to deliver out letters at the places of abode in the town.

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LORD MANSFIELD.—That case is an authority precisely upon the general point: but as it came before the court upon a special case, if the parties at the post-office were desirous to have a special verdict to litigate that opinion, it would not preclude them from bringing the question before this court. I am surprised that on a point of this kind, where either way there may be great inconveniences, where the acts of parliament are doubtful, and where the usage of places is contrary, the post-office does not apply to parliament to settle this matter. Therefore, we avoided the general question in the cases of *Bath** and *Glocester**, determined in this court; and in both those cases there was a right ground for our not going into the general question; which was this, that there the post-master demanded the additional charge as a *duty*; and it would be extraordinary, if parliament meant a duty should be raised at every post-town, that they did not fix it themselves, instead of leaving it in the breast of the post-master. Another reason why we wished to leave it open for the interference of parliament, was the unanswerable inconvenience of every body going to the post-office for their letters, on the one side, and on the other, the burthen to the post-master in not being allowed to deliver them to any person for gain.

* *Barnes v.*
Foley.
* *Stock v.*
Harris.

But that struck me in the *Glocester** cause, which I thought the true construction; namely, that there is a distinction between the place where the post-master ought to have the burthen thrown on him, and one beyond which he ought not to have it. I am convinced that the stress which has been laid in the argument of to-day on the opinion of the *C. B.* respecting the 4th *sect.* 5 *Geo.* 3. and which explains delivery to mean delivery at every body's place of abode within the limits of delivery, means all the district within a post-town; just as if you asked a man where he lived, and what was his post-town.

* *Stock v.*
Harris.

There is, however, a section in *stat.* 9 *Ann.* c. 10. *sect.* 22. which seems to mark the reasonable line, beyond which the post-master is not obliged, but within which he is obliged to deliver letters; the words of the section are as follow; "provided always and be it further enacted, that nothing herein contained shall be understood to prohibit the carrying or re-carrying of any letters or packets, to or from any town or place, to or from the next respective post-road or stage appointed for that purpose, above six miles from the said general post-

1774. " post-office, or the chief offices of *Edinburgh* and *Dublin* ; but
 SMITH " that every person shall have free liberty to send and employ
 versus " such person or persons as they shall think fit, to carry the said
 POWDICK. " letters or packets, as aforesaid, without any forfeiture or
 " penalty therefore ; any thing herein contained to the contrary
 " notwithstanding."

Now there is no general post that goes within 7 or 8 miles of *London* ; nevertheless the post-master has always delivered letters within *London* and the contiguous buildings at the established rate of postage : But he never delivered them at *Putney* ; that is a strong proof, coeval with the 1st statute which established a rate of postage, that there are boundaries. And this section lays a foundation for me to say, that there is such a line. The legislature forbids all letters to be carried by any other persons under certain circumstances and restrictions ; but it appeared necessary, if a place was four or five miles distant from a post-town or stage, that letters should be carried, and the persons carrying them paid for it. And I lay stress on the term *any town or place*. It says "*Town or place* ;" because there are some stages where there is but a single house, as *Hartfordbridge* ; but the town is considered as one spot, and the whole of it is taken as *terminus ad quem*. In the *Glocester* case, *Stock v. Harris*, Hil. 11 G. 3. R. B. the court considered the city of *Glocester* as the post-town or place, in opposition to limits out of the town ; and on that foundation it was held that the post-master had no right to vary the former usage. *Vide* this case since reported 5 Burr. 2,709.

In the present case, the post-office contends, that *in the town* there is no house that shall not pay an additional sum for the delivery ; which is in the highest degree unreasonable, if there is a distinction, which the post-office itself seems to have made, as in *London* ; viz. in respect to places contiguous to it. The post-town or place is certainly a boundary, within which the post-master is obliged to deliver letters at the rate of postage as established by act of parliament : and here the plaintiff's house is *within* the post-town. But in this case also the defendant has demanded the additional charge, as a *duty*, which he has no right to do whatever : So that we might get clear of it upon that ground, as we did in the *Bath* case. But we do not avoid the general question : on the contrary, our decision is expressly upon the general question. If the question is made with a view to controvert the judgment in the Common Pleas, we will defer our opinion to a
 second

second argument. My distinction does not go to the sending a letter two or three miles out of town.

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ASTON Justice. In *Stock v. Harris*, the *Glocester* case, the court decided that the post-master was obliged to deliver letters to all persons in the post town at the legal rate of postage only. The case of *Rowning v. Goodchild*, in C. B. is a decision upon the general question. A single post-house not in a town might possibly afford a question. But this is a post-town, and I am clearly of opinion, that the post-master is bound to deliver all letters within the post-town. If it is necessary to lay any additional charge, there ought to be an application to parliament for the purpose. The post-master cannot impose any sum: I am very well satisfied he has no such right: and with respect to inconvenience, it would be of infinite and general inconvenience to the public at large, if they were obliged to fetch their letters from the post-office; whereas this is only a private and particular inconvenience to the post-master.

WILLES Justice. I am most clearly of the same opinion. The usage in London and other great towns has been, to deliver all letters at the houses of the respective inhabitants to whom they are directed. In smaller post-towns the post-master has declined to do so without an additional allowance: probably because there were only a few persons to dispute the right. I think a post-town is different from what the case of a single post-house might be.

The *Bath* case was exactly this case. The defendant demanded the additional sum; and it was there clearly held he had no right to make such demand. So here it is demanded. The case of *Glocester* was decided upon the usage; those two cases, therefore, did not decide the general question: but the case of *Rowning v. Goodchild**, C. B. did. And, therefore, I am of opinion upon both grounds, namely, upon the general ground, and likewise upon its being a demand, that judgment should be given for the plaintiff.

* 2 Blackst.
Rep. 906.

ASHHURST Justice. I am of the same opinion.

Postea delivered to the plaintiff.

DOE on the demise of Bayntun versus WATTON, and Same day:
another.

IN ejectment, upon not guilty pleaded, the jury found a verdict for the plaintiff, subject to the opinion of the court upon the following case.

That *Jane Bayntun*, being seised in fee of the premises in the declaration mentioned, by her will bearing date Sept. 30,

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1745, duly executed, gave and devised the same to her nephew *Stucley Bayntun* for life, with remainder to his first and other sons in tail male, and the issue male of the body of such sons, and in default of such issue to her nephew *Henry Bayntun* in like manner, with remainder to her nephew *William Bayntun* the lessor of the plaintiff in like manner. In which will was contained the following power: "I do hereby declare, elect, and appoint, and my will and mind is that it shall and may be lawful to and for the said *Stucley Bayntun*, *Henry Bayntun* and *William Bayntun*, and for each and every of them, at any time or times, when they shall come into the actual possession of the said manors, capital messuages, and premises hereby by me given to them as aforesaid, by any writing or writings to be subscribed and sealed by any or either of them, when possessed of the said premises as aforesaid, in the presence of three witnesses, at the least, to demise, lease, or grant the said premises, to each of them hereby granted as aforesaid, to any person or persons whatsoever, for the term of one and twenty years, or under, or for any number or term of years determinable upon one, two, or three lives, *in possession*, and *not in reversion*."

That the said *Jane Bayntun* died seised of the said premises; on whose death the said *Stucley Bayntun* entered, and in his life time the said *Henry Bayntun* died without issue.

That the said *Stucley Bayntun* on Jan. 21st 1772, by indenture made and duly executed between the said *Stucley Bayntun* of the one part, and *Anne Surman* of *Chadlington* of the other part, did demise all and singular the said premises in the said ejectment mentioned, to the said *Anne Surman*, to hold unto the said *Anne Surman*, her executors, administrators, and assigns, *from the day of the date* thereof, for and during and unto the full end and term of fourscore and nineteen years, from thence next ensuing, and fully to be complete and ended, if she the said *Anne Surman*, *Sarah Newman*, and *Edward Newman*, son and daughter of *Hannah Newman* of *Chadlington* aforesaid, any or either of them, should so long happen to live, &c.

That the said *Stucley Bayntun* died without issue.

The question was, Whether upon the whole of this case the plaintiff had a right and title to recover?

Mr. *Howorth* for the plaintiff objected, that this lease being made to commence *from the day of the date*, was a lease in *reversion* and not in *possession*; and therefore not pursuant to the power.

Mr.

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Mr. Baldwin for the defendant acknowledged there were a great many authorities against him, in cases of *freehold* demises; but none in the case of a lease under a *power* given. On the contrary, he insisted, that the execution of powers have always been construed most liberally in favour of the party for whose benefit they are intended: and cited *Tollett versus Tollet*, 2 P. Wms. 489. where *Baron* having a power to make a jointure by deed, did it by *will*, and the court held it a good execution of the power notwithstanding.

With respect to the lease being a lease in reversion, as being to commence *from the day of the date*, he cited the case of *Lluellen versus Morgan*, cited in 3 *Bulstrade*, 203. *Bacon versus Waller*; in which first case it was held, that a lease made *habendum a datu* and *a die datu*s, was all one.

In 2 *Salk*. 413. 1 Lord Raym. 84. S. C. it is laid down that a lease to commence *a datu*, includes the day of the date.

And in 2 *Wilson* 165. *Freeman* on demise of *Vernon* versus *West*, the court decided, that a lease for lives to begin from the day of the date, and seisin delivered afterwards, is good, and shall not be said to convey a freehold to commence *in futuro*: and in a note at the end of the report, it is added, that Mr. Justice *Wilmot*, at a former trial in ejectment upon this same lease, was of opinion, that from the date and from the day of the date, was the very same, and both included the day.

ASHHURST Justice. Mr. Justice *Wilmot* in that case left it to the jury to say, whether they would not presume that livery of seisin was made subsequent to the lease.

Mr. Howorth. The distinction that universally prevails through all the cases is, that a lease to commence from the date includes the day, but a lease to commence from the day of the date, as in the present case, excludes the day of the lease made: and the case of the Countess of *Portland*, in the *Exchequer*, is in point. It was argued four times and finally adjudged. The case cited from *Wilson* must be a mistake.

LORD MANSFIELD. I think it must be so, and the other authorities are, I am afraid, too strong to get over. At the same time I am sorry that there ever existed a determination, which avoided a fair lease, by construing from the day of the date, to exclude the day of the date; because it may be taken either way. It would have been a very right principle of law to have said, if the one construction will render the lease good, and the other will

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will make it void, the construction which makes the lease good shall prevail; because it must manifestly have been the intention of all parties, that the lease should be a valid and effectual lease.

I applaud Lord Chief Justice *Wilmot*, for leaving it to the jury, to presume livery of *seisin* the last moment of the day, and if this case could be determined that way, I certainly should wish for it; but it cannot. If you think you can find a contrariety of authorities, I should be glad to lay hold of it, and should be glad to bring the matter back to common sense and the clearest principles of justice: adding the word *exclusive*, or *inclusive*, would be decisive. Then it is a question of construction which word should be implied.

ASTON Justice. I think it a very hard case; but the authorities are too many to be got over. The case in *Wilson* must be a mistake.

Mr. Justice *Willes*, and Mr. Justice *Asbhurst* concurred.

Judgment for the Lessor of the Plaintiff.

Vide post. *Doe ex dim. Pugh versus Duke of Leeds, infra*, 724. a very elaborate opinion of the court, in which it was held, that from the date and from the day of the date may both include the day of the date.

Same day.

SCHULDAM *versus* BUNNISS and another.

Persons empowered by Stat. 3 Geo.

3. c. 15. to inspect the entries of freemen, have a right to inspect

ALL books, papers, &c. in which the admissions of freemen are entered.

And where there are two or more

Bailiffs, &c. of a Borough or Corporation, a joint action will lie, if they refuse inspection, though the words of the statute are in the singular number, *mayor, bailiff, &c.*

IN debt for five penalties upon the Stat. 3 G. 3. c. 15. the declaration consisted of five counts.

At the trial a verdict was given for the defendants, upon the second count, and for the plaintiff upon all the other counts, subject to the opinion of the court, on the following case.

“ That the borough of *Aldeburgh* sends members to parliament; that the freemen of the borough become such, either from a servitude of seven years apprenticeship, or by election; that the right of electing freemen is in the capital burgesses by act of court, in their corporate assemblies, consisting of a certain number of the members of the borough of certain denominations.”

“ That there is an *assembly book*, in which the election of officers, the nomination and admission of freemen, and all other acts of court are entered; which book is kept in a chest, under two locks and keys, and is in the custody of the bailiffs of the borough. That the entries of admissions of freemen in this

borough, though the words of the statute are in the singular number, *mayor, bailiff, &c.*

book expresses them as being *duly elected*, or as taking by *servitude*: but almost all the freemen are now *honorary* freemen. That for about eight years last past, the admissions of freemen have not been entered in this book; and the town clerk said, they were so omitted by direction; but that such direction was not the order of the court.

That there is likewise a *stamp book*, made and kept by the town clerk, in which the admissions of freemen are entered, with the times of their admission; but it does not contain the names and characters of the persons constituting the courts at which the admissions were made. That in this book the title to the freedom is not in general set out, but there are a few instances in which the freemen are said to have been *elected*, and in one or two to have taken up their freedom by *servitude*.

That there is likewise a copy or duplicate of this book which is kept by the bailiffs.

The town clerk also said, that since the entry of the admissions in the *assembly book* had been discontinued, he had sometimes taken a minute of the admissions on loose papers; but that he did not file them or preserve them in any order, but sometimes carried them home to his house at *Ipswich*, and sometimes left them loose in the *assembly book*.

The town clerk likewise said, that a dishonest man in his office had it in his power, if he was so disposed, to enter fictitious freemen in the *stamp book*.

That in *May 1773*, there was an election for one member of parliament; when Mr. *Fonnereau* and the afore said Mr. *Long* were candidates; and there having been a large creation of freemen lately made, by the interest of Mr. *Fonnereau*, Mr. *Long* was desirous of seeing whether they were made constitutionally; and therefore caused the several demands stated in the declaration for the inspection of the *assembly book*, to be duly made, according to the direction of the stat. 3 Geo. 3. But the defendants refused to produce it, or to permit such inspection; referring the parties demanding the same, to the *stamp book*, in the hands of the town clerk (of which Mr. *Long* had had a copy before, and in which the late creation was inserted), or offered to produce the duplicate in their custody, for inspection.

One of the present bailiffs at the trial, though subpœnaed for that purpose with a *subpœna duces tecum*, refused to produce the said book at the trial.

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The defendants called no witnesses; but insisted that by the meaning of the *stat. 3 Geo. 3. c. 15.* they had not incurred any penalty by not producing or permitting an inspection of the assembly book. The question was, Whether under the circumstances of this case, the defendants were obliged to produce the assembly book within the meaning of the *stat. 3 Geo. 3. c. 15.*

This case was argued twice. 1st, In this term, by Mr. Cole for the plaintiff, and Serjeant Sayer for the defendants. Afterwards in *Hilary* term, by Serjeant Foster for the plaintiff, and Mr. Dunning for the defendants.

The objections were two; 1st, That the stamp book was the only book within the meaning of the *stat. 3 Geo. 3.* 2dly, That the action which was *joint*, ought to have been brought against the defendants *separately*.

Serjeant Sayer for the defendants. The 1st question is, What sort of inspection the *stat. 3 Geo. 3. c. 15.* meant to give? And clearly, it meant to give no other than was sufficient to answer the end of the statute; the sole object of which is, to prevent occasional freemen from voting at elections: these the act describes to be, such persons as have not been admitted to their freedom twelve calendar months before the election; and to enable the parties to know who are within that description, it provides, "that the mayor, &c. shall, upon demand of any candidate, his agent, or two freemen, permit such candidate, &c. to inspect the books and papers, wherein the admission of freemen shall be entered, &c." But the legislature by using the words *books and papers*, could never intend that a party should inspect all the books and papers of a corporation for a century back, or any other unlimited time; but only such as contain any entry of freemen admitted as recently as the last twelve months. If so, the assembly book (the suppression of which is imputed to the defendants) is not within the purview of the act; for it is in evidence, that no admission whatever had been entered in the assembly books for the last eight years; that the stamp book was the only book in which any entry had been made during that time; consequently it was the only book which could afford any information on the subject of occasional freemen; and therefore the only one which the parties had a right to inspect.

2dly, This action ought to have been brought against the defendants *separately*; for the words of the statute are, "*mayor, bailiff,*" &c. which shews, it ought to be brought against every bailiff, &c. offending, in the *singular* number; and if the
defendants

defendants might be joined, the statute would be evaded by lessening the penalty which the party has no right to. Therefore the action is ill brought.

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The court seemed clear for the plaintiff upon the first objection. But thinking the verdict which was taken for five penalties hard and unreasonable, inclined to listen to the second, and therefore ordered it to stand over for another argument upon this latter objection only.

Upon the second argument Serjeant *Foster* for the plaintiff: ist, as to the verdict being oppressive, the statute meant to give repeated penalties for repeated offences; otherwise if a single penalty only could be recovered, the object of the legislature would be entirely frustrated; because it would well answer the purpose of a candidate to indemnify the officer for refusing.

With respect to the action being ill brought, because jointly against both bailiffs, their *office* is but *one*, and *both* make but *one* officer; therefore the action is well brought against them jointly. 11 *Rep.* 2. Auditor *Curle's* case. 1 *Show.* 289. 2 *Mod.* 23. 3 *Lew* 399. *Carth.* 145. *Cro. El.* 625. 8 *Mod.* 303. *Salter v. Grosvenor.*

Lord *Mansfield* being called away to the Exchequer chamber, recommended it to *Foster* to consult his client *how many* penalties he would insist upon. On Lord *Mansfield's* return, *Foster* declared he would be content to take *one only*; whereupon Lord *Mansfield* called upon the counsel for the other side to go on.

Mr. *Dunning contra.* The object of this act of parliament is to make the parties offending pay the penalties, and not a person who never offended at all. The question is, Whether this action is rightly conceived, which supposes the bailiffs to have committed a partnership offence, and therefore to be both liable.

With regard to the cases cited, they all fall within this rule of distinction: that where the offence is in the nature of a *trespass*, there it is equally competent to the party injured to bring a *joint* or *separate* action. But where it is an act of *omission*, as in this case, the omission of the *one* cannot be considered as the omission of the *other*.

Supposing a distinct refusal had been proved, it was competent to the party aggrieved to have recovered against the bailiff obstructing, but not against the other. Therefore the action ought to have been brought separately against each of them.

Lord *Mansfield.* By the act of parliament to prevent occasional votes, it is provided, that where the right of election is in
O 2 freemen

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freemen, none shall vote unless they shall have been admitted to their freedom twelve calendar months previous to the election; with an exception however as to all those, who are made freemen upon the foundation of inchoate rights; as by birth, marriage, or servitude. In this act there is a clause, upon which the present action is brought. I will read it.

“ And be it further enacted by the authority aforesaid, that
“ the mayor,* bailiff, sheriff, town-clerk, or other officer of any
“ corporation, having the custody of, or power over the records
“ of the same, &c.”

You observe from my manner of reading it that this clause is technically penned; and though throughout the kingdom it is well known these offices are executed by more persons than one, and that there are other offices in which many persons are joined, yet this act considers each officer as single, and describes him according to his office.

The present action was brought against the two defendants, as the bailiff of the town of *Aidborough*, for refusing the plaintiff an inspection of the book or books wherein were entered the admission of freemen; and it is brought against them jointly as the *bailiff* or persons executing that office. (His Lordship stated the case *verbatim*, and proceeded thus:)

At the trial there was no other question or difficulty than barely whether the assembly book was within the description of the act of parliament. And there can be no doubt as to that; because the act relates to all books which contain the nomination and admission of freemen, and this is such a book, though it is not a book that comes down to late times. But a party may want to know whether other persons have a right by servitude, &c. as well as to discover who are occasional freemen, therefore he has a right to inspect all such books and papers. In this case the stamp book, at best, is but an irregular one. But it did appear to me on the state of the case, that the bailiffs had conceived a doubt upon that point; and having been taught to believe, from the circumstance of the occasional freemen being entered in the stamp book, and the act of parliament operating only upon such freemen as were admitted within a year, that the stamp book was the only book within the meaning of the act, they had proceeded under an apprehension that they were right in refusing an inspection of any other.

* His Lordship laid a stress upon the name of each different officer being in the singular number.

That

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That being the light in which I saw their conduct, I did not doubt at all that for several offences several penalties might be recovered; but I thought a verdict for so many penalties hard and unreasonable. No doubt if a party chose to go to the utmost extent and rigour of the act, he might, by repeated demands, raise 10,000 *l.* or a larger sum. I therefore was willing to listen to the objections, and recommended it to the parties to consider whether they would insist upon all the penalties.

A formal objection which has been made is, Whether the action can be maintained against *both*; and most undoubtedly it may; for the breach of trust in one is a breach of trust in both. But in this case the fact is, that they both refused: therefore there can be no doubt but that they might be charged *jointly*.

As to Justice. The right given by the act of parliament, is a right of inspecting all books in which the admissions of freemen are inserted: and copies may be taken by the parties applying. And a candidate may not only want them for the purpose of seeing who his adversaries are; but it may be likewise necessary to him for the purpose of taking copies of the admissions of his own voters. Therefore he has clearly a right to see *all* the books.

With regard to the other question, Whether the action will lie against them jointly; the bailiffs are in law but one officer. If one had opened the books and the other had refused, no action could lie against the latter. But here both refused; and both must answer for the delinquency of both.

Mr. Justice *Willes* and Mr. Justice *Asbhurst* of the same opinion.
Let the *Posse* be delivered to the plaintiff.

CLARKE *versus* SHEE and JOHNSON.

Tuesday,
Nov. 22d.

THIS was an action of trespass on the case, wherein the plaintiff declared, that the defendants on the 1st of *June* 1773, at *London*, &c. were indebted to the plaintiff in the sum of 1,000 *l.* for divers sums of money to the defendants, by the plaintiff, at the special instance and request of the defendants, before that time lent and advanced. There were two other counts for money laid out and expended, and for *money had and received* by the defendants to the plaintiff's use.

To this declaration the defendants pleaded the *general issue*, and thereupon issue was joined.

Case for money had and received, will lie by the true owner of money or notes against a third person, into whose hands they have come *malâ fide*; ascertained.

provided their identity can be traced and

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This case came on to be tried at the sittings after *Trinity* term 1774, at *Guildhall, London*, before Lord *Mansfield*; when a verdict was found for the plaintiff, damages 459*l.* 4*s.* 4*d.* and costs 40*s.* subject to the opinion of the court upon the following case.

That *David Wood* being a clerk to the plaintiff a brewer, and receiving money from the plaintiff's customers, and also negotiable notes for the plaintiff's use in the ordinary course of business, paid several sums with the said money and notes at different times, to the amount of 459*l.* 4*s.* 4*d.* to the defendants upon the chances of the coming up of tickets in the *State Lottery* of 1772, contrary to the lottery act of the said year 1772.

The plaintiff and the said *Wood's* sureties have released him.

The question was, Whether the said *Wood* ought to have been admitted as a witness to prove the above case, and supposing his evidence admissible, whether the plaintiff is entitled to recover in this action.

Mr. *Davenport* for the plaintiff. Two questions arise in this case, 1st, Whether *Wood* ought to have been admitted as a witness? and 2dly, Whether the plaintiff is entitled to recover?

First, as to the latter question, Whether the plaintiff had a right to recover? This depends upon whether the money was originally the plaintiff's property. If it was, and it appears that the defendants have no right to withhold it, the law will imply an *assumpsit* in this case. Now it is in evidence that the money was paid to the defendants for the insurance of chances, contrary to the express prohibition of the *stat. 12 Geo. 3. c. 36.* which in that case makes the receipt null and void; therefore they are wrong doers, and have no right to withhold it. It is likewise in evidence that this was the identical money which *Wood* had received for his master's use; consequently, if the testimony of *Wood* is admissible, the plaintiff is entitled to recover.

II. Point. *Wood* is an admissible witness: 1st, Because by the release it was indifferent to him whether his master recovered or not; therefore he is a disinterested servant; but if not, in cases of necessity like this, even an interested servant may be a witness. 2dly, If objected that he was incapacitated, as being *particeps criminis*, the exception will not hold; because here, the plaintiff is an innocent person; and therefore had a right to call him in support of this action.

Mr. *Buller contra* for the defendants. II. Point. *Wood* is a *particeps criminis*; and therefore clearly incompetent: for no man shall

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shall be admitted to prove his own turpitude ; as perjury or the like. This man was called to prove himself guilty of a breach of trust in embezzling his master's money, and also of a breach of the act of parliament ; therefore his evidence was inadmissible. In *Holt versus Tyrell, East, 13 Geo. 1. R. B.* at bar, a trustee was not allowed to prove himself guilty of a breach of trust. The case was this ; in debt upon bond the defendant pleaded the *Stat. 5 and 6 Ed. 6. c. 16.* against buying and selling offices : and upon the trial a witness was called to give an account upon what occasion the bond was given : but Lord *Raymond* chief justice, refused to admit him, because he was privately entrusted to make the bargain by both parties, and to keep it secret.

1st Point. The plaintiff is not entitled to recover ; for there is no contract either express or implied in respect of him ; nor was the money ever received as his : on the contrary, the whole transaction was between the defendant and the witness ; and so far as in an illegal proceeding like this, which is *ipso facto* void, there can be said to be any undertaking by the defendants, it has been complied with : for though they were fortunate by the numbers not coming up, yet they have run the risk, and therefore performed their part of the agreement : consequently, there is no foundation for an action to recover back the money paid. It is like the case of money given to an agent to bribe a custom-house officer ; in which case no action will lie to recover it back ; or money paid upon an usurious contract, which was the case in *Tomkins versus Barnett, 1 Salk. 22.*

Lord MANSFIELD. That case has been denied a thousand times.

Mr. *Buller*. But the principle is a sound one, and applies in this case ; namely, that *ex maleficio non oritur contractus ; et in pari delicto potior est conditio defendentis* : there the transaction was illegal, therefore no action will lie.

Lord MANSFIELD after stating the case. As to the first question there can be no doubt but that *Wood* was an admissible witness. In *Bush versus Rawlins*, in debt upon the *Stat. 2 Geo. 2. c. 24.* against bribery, a man who had taken the bribery oath, was held a competent witness, to prove that he himself had been bribed.

The next question is, Whether the plaintiff can maintain this action ? This is a liberal action in the nature of a bill in equity ; and if, under the circumstances of the case, it appears that the

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defendant cannot in conscience retain what is the subject-matter of it, the plaintiff may well support this action.

There are two sorts of prohibitions enacted by positive law, in respect of contracts. 1st. To protect weak or necessitous men from being over-reached, defrauded, or oppressed. There the rule *in pari delicto, potior est conditio defendentis*, does not hold; and an action will lie; because where the defendant imposes upon the plaintiff it is not *par delictum*.

The case of *Tomkins versus Barnett*, has been long exploded. In *Bosanquet versus Dashwood*, Lord Hardwicke and Lord Talbot both declared their disapprobation of it: for in that case there was not *par delictum*. In the case of money given by a bankrupt or his relations* to a creditor, to sign the certificate, the transaction is against the express prohibition of the act of parliament, and both are parties to it, but not equally guilty; for the bankrupt is an oppressed party; and therefore the action will lie.

* *Smith v. Bromley*, common law.
Mansfield, 1760. *Buller's Nisi*, Pri. 132.

The next sort of prohibition is founded upon general reasons of policy and public expedience. There both parties offending are equally guilty; *par est delictum, et potior est conditio defendentis*. The prohibition in the lottery act, stat. 12. Geo. 3. c. 63. is of this sort; and in this case no doubt but the defendants and the witness *Wood*, were equally guilty. Therefore at *Guildhall*, upon the first impression, I was of opinion against the plaintiff; because I thought that the master could not stand in a better situation than the servant, and the servant was clearly *particeps criminis*. But I changed my opinion: I thought, and now think, the plaintiff does not sue as standing in the place of *Wood* his clerk: for the money and notes which *Wood* paid to the defendants, are the identical notes and money of the plaintiff. Where money or notes are paid *bonâ fide*, and upon a valuable consideration, they never shall be brought back by the true owner; but where they come *malâ fide* into a person's hands, they are in the nature of specific property; and if their identity can be traced and ascertained, the party has a right to recover. It is of public benefit and example that he should: but otherwise, if they cannot be followed and identified, because there it might be inconvenient and open a door to fraud. *Miller versus Race*, 1 *Bur.* 452: and in *Golightly versus Reynolds*, the identity was traced through different hands and shops. Here the plaintiff sues for his identified property, which has come to the hands of the defendants iniquitously and illegally, in breach of the

act of parliament. Therefore they have no right to retain it; and consequently the plaintiff is well entitled to recover.

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The three other judges concurred.

Judgment for the plaintiff.

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GOODRIGHT ex dim. ELIZABETH CARTER, *versus* Same day.
STRAPHAN and others.

UPON shewing cause why a new trial should not be granted the case appeared to be as follows:

Re-delivery by *feme*, after death of baron, of a deed delivered by her whilst *covert*, is a sufficient confirmation of such deed, so as to bind her, without its being re-executed, or re-attested. And circumstances alone may be equivalent to such re-delivery, tho' the deed be a joint-deed by baron and *feme* affecting the wife's land, and no fine levied.

In ejectment for a house in *Thames-street*, the lessor of the plaintiff shewed a right under the will of one *James Roberts*, dated *July 14th, 1710*. The defendants claimed as or under the representatives of one *Greening*, who had been in possession from the year 1737. But it was shewn that he had accounted for the rents and profits, to the lessor of the plaintiff and her husband, and therefore there was no pretence for a bar by the statute of limitations. But the objection was, that by indenture bearing date 19th *July 1737*, and made between *Charles Carter* and *Elizabeth* his wife on the one part, and *William Greening*, on the other part, reciting, that *Elizabeth Carter*, the lessor of the plaintiff, after the decease of *Mary Trimmer*, by virtue of the will of *James Roberts*, was or would be well entitled to the inheritance of the said house in *Thames-street*, and also to three other houses in *Reading*: and reciting, that the said *Charles Carter* was then indebted to *Greening*, in 102 *l.* and at the special instance and request of the said *Charles Carter*, and *Elizabeth* his wife, had agreed to furnish them with a further sum of 144 *l.* for the maintenance and subsistence of them and their family, so long as the said *Mary Trimmer* should live; by way of mortgage, they demise to him as well the said house in *Thames-street*, as the three houses in *Reading*, for the term of 99 years, at a pepper-corn rent, from the death of the said *Mary Trimmer*; nevertheless upon condition, that if the said *Carter* or his wife, or one of them, their executors, administrators, or assigns, should pay to the said *Greening* the said sum, &c. with interest, at the end of six months after the decease of *Mary Trimmer*, then the said indenture of demise should cease, &c. and the husband covenants that he would pay, &c. and the deed was executed by both,

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Three exhibits were produced, all subsequent to the death of *Charles Carter* the husband. The first was an account stated, consisting amongst other articles of a receipt for rent of the house in *Thames-street*, from 1755 to 1760, out of which was deducted an article for interest due, a balance struck, and the account signed by *Elizabeth Carter*.

The second as follows: 23d May, 1763. I do hereby surrender the possession of a house belonging to me at *Reading*, late in the occupation of Mr. *Collins*, but now empty, to Mr. *Thomas Sanders* and *William Smith*, executors of Mr. *William Greening*, deceased, the mortgagee thereof. Signed *Elizabeth Carter*; witness *John Lewis*.

The third, 23d May, 1763. Mr. *Miles*, I do hereby direct you to attorn tenant for your house and shop at *Reading*, from Lady-day last, to Mr. *Thomas Sanders* and Mr. *William Smith*, executors of Mr. *William Greening*, the mortgagee of the said premises, and to pay them all rent that shall become due for the same, from that time; and I desire you will pay the rent that was due at Lady-day last, to the same person as you formerly paid your rent to for my use. Signed *Elizabeth Carter*; witness *John Lewis*.

Mr. *Wallace* and Mr. *Bearcroft* for the defendants argued, that the lease was not void, but only voidable; and that the acts done by the plaintiff amounted to a confirmation of the deed: and cited *Hutton* 55. 102. 2. Rep. 60. *Wiscot's case*. *Dyer* 91. pl. 13. *Dyer* 159. *Cro. Eliz.* 112. *Jackson v. Mordaunt*. 1 Rol. Abr. 475.

Mr. *Dunning*, contra, for the plaintiff, insisted that the deed of a married woman is void: and that in this case there was no act of ratification as to the house in *London*, for which the present ejectment was brought, whatever there might be as to the lands in *Reading*. That with respect to the authorities cited, they were all cases of leases, in support of which the court had been very liberal: but this was a mortgage, not a lease; and therefore not within the reason of those cases.

Cur advisare vult.

Afterwards, on Thursday the 24th of November, Lord Mansfield delivered the opinion of the court. His lordship stated the case as above and then proceeded as follows:

It is insisted by the defendants, that the several exhibits proved in the cause amount to a ratification of the mortgage by the lessor of the plaintiff. In strictness, a fine is the proper method for a married woman to part with her right; so that a formality
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of law only is wanting. But in conscience she has confirmed this security which was entered into for the maintenance and support of herself and family. She and her husband, in immediate want of money for their subsistence, apply to *Greening*, to lend them 150 £. upon the mortgage of a reversion: *Greening* readily acquiesces, advances it without reserve, and is content to lay out of his money 'till the reversion should fall in. In a case so circumstanced, I thought it cruel to contend for the wife, that the mortgage was void; and after so many solemn acts on her part, it is a proceeding against every principle of natural justice and equity. Therefore I directed the jury, that if they thought the facts given in evidence amounted to a sufficient confirmation by the wife, they should find for the defendants; and they have so done.

Mr. *Wallace* at the trial put it upon the footing of leases by husband and wife reserving rent or no rent; which the authorities say are not void, but only voidable by the wife after the husband's death, and if she ratifies them she is bound. It was answered, that those authorities were by way of exception to the general rule of law, which says, the deed of a married woman is void; and they were allowed of for the sake of agriculture and tillage. That this, it is true, is a lease for 99 years, and a century ago the court would not have seen further; but now it is said the court must look further and see the real intent of the deed; namely, that it was a mortgage.

We are all of opinion, that the answer is a good one; and that the exception to the general rule was allowed of for the advancement of agriculture and tillage.

We are also of opinion, that the court ought to look into the substance of the deed, and to see with the same eyes as the rest of the world: it is in *substance* a mortgage, though in *form* a lease for 99 years. But we think we have good authority to say, that the wife is nevertheless bound by it, and that her subsequent acts set up this mortgage against her.

Perkins, which is a very good authority in point of law, in *sect.* 154. says, "It is to be known that a deed cannot have
" and take effect at every delivery as a deed; for if the first de-
" livery take effect, the second delivery is void. As in case an
" infant, or a man in prison, makes a deed, and deliver the same
" as his deed, &c. and afterwards the infant, when he cometh
" to his full age, or the man imprisoned when he is at large, de-
" liver again the same deed as his deed, which he delivered before

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" as his deed, this second delivery is void. But if a married woman deliver a bond unto me, or other writing as her deed, this delivery is merely void; and, therefore, if after the death of her husband she being sole, deliver the same deed again unto me as her deed, the second delivery is good and effectual." The year books, *Mich. 3 Hen. 6. 4. and Hil. 8 Hen. 6. 8.* confirm the proposition laid down by *Perkins*; namely, that the deed is not to be re-executed or re-attested, but delivered only. Now delivery is an act in *pais* only.

The question then is, Whether the law has laid down any precise form in which delivery must be made, or whether circumstances may not be equivalent to it without actual delivery?

Lord *Coke* in his *Commentary on Lit.* 36, says, "As a deed may be delivered to the party without words, so a deed may be delivered by words, without any act of delivery: as if the writing sealed lies upon the table, and the feoffor or obligor says to the feoffee or obligee, take up the said writing, it is sufficient for you, as it will serve your turn, it is a sufficient delivery."—2 *Roll. Abr.* 26. *pl.* 2.

This brings it to the single question, Whether these facts amount to a delivery. Now the mortgage deed was in the hands of the mortgagee: the wife, after the death of her husband the mortgagor, surrenders possession under her own hand to *Sanders* and *Smith*, the executors of the mortgagee, and orders the tenants to attorn to them as executors of the mortgagee in terms. This is a clear acknowledgment that the deed was hers, and that she was content, the defendants should enjoy according to the terms of the deed.

Therefore, we are all of opinion for the defendants, and that these facts were a confirmation of the mortgage, upon the ground of their being equivalent to a re-delivery of the deed.

Per. Cur. unanimously. Rule for a new trial discharged.

CAMPBELL *versus* HALL,

THIS case was very elaborately argued four several times; and now on this day Lord *Mansfield* stated the case, and delivered the unanimous opinion of the court, as follows;

This is an action that was brought by the plaintiff *James Campbell*, who is a natural born subject of this kingdom, and who, upon the 3d of *March* 1763, purchased a plantation in the island of *Grenada*: and it is brought against the defendant

William

William Hall, who was a collector for his Majesty of a duty of four and an half *per cent.* upon all goods and sugars exported from the island of *Grenada*. And the action is brought to recover back a sum of money which was paid, as this duty of four and an half *per cent.*, upon sugars that were exported from the island of *Grenada*, by and on account of the plaintiff. The action is an action for money had and received; and it is brought upon this ground; namely, that the money was paid to the defendant without any consideration; the duty, for which, and in respect of which he received it, not having been imposed by lawful or sufficient authority to warrant the same. It is stated by the special verdict, that that money still remains in the hands of the defendant, *not paid over* by him to the use of the king, but continued in his hands, and so continues with the privity and *consent* of his Majesty's *Attorney General*, for the express purpose of trying the question as to the validity of imposing this duty.

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It came on to be tried at *Guildhall*, and of course, from the nature of the question, both sides came prepared to have a special verdict; and a special verdict was found, which states as follows.

That the island of *Grenada* was taken by the *British* arms, in open war, from the *French* king.

That the island of *Grenada* surrendered upon capitulation, and that the capitulation on which it surrendered, was by reference to the capitulation upon which the island of *Martinique* had before surrendered.

The special verdict then states some articles of the capitulation, and particularly the 5th article, by which it is agreed, That *Grenada* should continue to be governed by its present laws until his Majesty's further pleasure be known. It next states the 6th article; where, to a demand of the inhabitants of *Grenada*, requiring that they should be maintained in their property and effects, moveable and immoveable, of what nature soever, and that they should be preserved in their privileges, rights, honors, and exemptions; the answer is, the inhabitants, being *subjects* of *Great Britain*, will enjoy their properties and privileges in like manner as the other *his Majesty's subjects* in the other *British Leeward Islands*: so that the answer is, that they will have the consequences of their being subjects, and that they will be as much subjects as any of the other *Leeward Islands*.

Then it states another article of the capitulation; *viz.* the 7th article, by which they demand, that they shall pay no other duties

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duties than what they before paid to the *French* king; that the capitation tax shall be the same, and that the expences of the courts of justice, and of the administration of government, should be paid out of the king's demesne: in answer to which they are referred to the answer I have stated, as given to the foregoing article; that is, being *subjects* they will be entitled in like manner as the *other his Majesty's subjects* in the *British Leeward Islands*.

The next thing stated in the special verdict is, the treaty of peace signed the 10th *February*, 1763; and it states that part of the treaty of peace by which the island of *Grenada* is ceded; and some clauses which are not at all material for me to state.

The next instrument is a proclamation under the great seal, bearing date the 7th of *October*, 1763, wherein amongst other things it is said as follows:

Whereas it will greatly contribute to the speedy settling our said governments, of which the island of *Grenada* is one, that our loving subjects should be informed of our paternal care for the security of the liberties and properties of those who are and shall become inhabitants thereof: we have thought fit to publish and declare by this our proclamation, that we have in our *letters patent* under our great seal of *Great Britain*, by which the said governments are constituted, given *express power and direction* to our governors of the said colonies respectively, that so soon as the state and circumstances of the said colonies will admit thereof, they shall, with the advice and consent of the members of our council summon and call general assemblies, within the said governments respectively, in such manner and form as is used and directed in those colonies and provinces of *America*, which are already under our immediate government; and we have also given power to the said governors, with the consent of our said councils, and the *representatives of the people* to be summoned as aforesaid, to make, constitute, and ordain laws, statutes, and ordinances, for the public peace, welfare, and good government of our said colonies and the inhabitants thereof, as near as may be agreeable to the laws of *England*, and under such regulations and restrictions, as are used in our other colonies.

The next instrument stated in the special verdict, is the *letters patent* under the great seal, or rather a proclamation, bearing date the 26th *March*, 1764; wherein, the king recites a survey and division of the ceded islands, and that he had ordered them

to be divided into allotments, as an invitation to purchasers to come in and purchase upon the terms and conditions specified in that proclamation.

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The next instrument stated, is the *letters patent* under the great seal, bearing date the 9th of *April*, 1764. In these letters there is a commission appointing General *Melville* governor, with a power to *summon an assembly* as soon as the state and circumstances of the island would admit, and to make laws with consent of the governor and council, with reference to the manner of the other assemblies of the king's provinces in *America*. This instrument is dated the 9th of *April*, 1764. The governor arrived in *Grenada* on the 14th *December*, 1764, and before the end of the year 1765, an assembly actually met in the island of *Grenada*. But before the arrival of the governor at *Grenada*, indeed before his departure from *London*, there is another instrument upon the validity of which the whole question turns, which instrument contains *letters patent* under the great seal, bearing date the 20th *July*, 1764. Wherein, the king reciting, that whereas, in *Barbadoes*, and in all the *British Leeward Islands*, there was a duty of four and an half *per cent.* upon all sugars, &c. exported; and reciting in these words; that whereas it is reasonable and expedient, and of importance to our other sugar islands, that the like duty should take place in our said island of *Grenada*; proceeds thus: we have thought fit, and our royal will and pleasure is, and we do hereby, by virtue of our prerogative royal, order, direct, and appoint, that from and after the 29th day of *September* next ensuing the date of these presents, a duty or impost of four and an half *per cent.* in specie, shall be raised and paid to us, our heirs and successors, upon all dead commodities, the growth and produce of our said island of *Grenada*, that shall be shipped off from the same, in lieu of all customs and import duties, hitherto collected upon goods imported and exported into and out of the said island, under the authority of his most Christian Majesty.

The special verdict then states that in fact this duty of four and an half *per cent.* is paid in all the *British Leeward Islands*, and sets forth the several acts of assembly relative to these duties. They are public acts: therefore, I shall not state them; as any gentleman may have access to them; they depend upon different circumstances and occasions, but are all referable to those duties in our islands. This, with what I set out with in the opening,

is

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The general question that arises out of all these facts found by the special verdict, is this; whether the *letters patent* under the great seal, bearing date the 20th July, 1764, are good and valid to abolish the *French* duties; and in lieu thereof to impose the four and half *per cent.* duty above mentioned, which is paid in all the *British Leeward Islands*?

It has been contended at the bar, that the *letters patent* are void on two points; the *first* is, that although they had been made before the proclamation of the 7th October, 1763, yet the king could not exercise such a legislative power over a conquered country.

The *second* point is, that though the king had sufficient power and authority before the 7th October, 1763, to do such legislative act, yet before the *letters patent* of the 20th July, 1764, he had divested himself of that authority.

A great deal has been said, and many authorities cited relative to propositions, in which both sides seem to be perfectly agreed; and which, indeed are too clear to be controverted. The stating some of those propositions which we think quite clear, will lead us to see with greater perspicuity, what is the question upon the first point, and upon what hinge it turns. I will state the propositions at large, and the first is this:

A country conquered by the *British* arms becomes a dominion of the king in the right of his crown; and, therefore, necessarily subject to the legislature, the parliament of *Great Britain*.

The 2d is, That the conquered inhabitants once received under the king's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens.

The 3d, That the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning.

The 4th, That the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An *Englishman* in *Ireland*, *Minorca*, the *Isle of Man*, or the *Plantations*, has no privilege distinct from the natives.

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The 5th, That the laws of a conquered country continue in force, until they are altered by the conqueror: the absurd exception as to *Pagans*, mentioned in *Calvin's* case, shews the universality and antiquity of the maxim. For that distinction could not exist before the Christian æra; and in all probability arose from the mad enthusiasm of the *Croisades*. In the present case the capitulation expressly provides and agrees, that they shall continue to be governed by their own laws, until his majesty's further pleasure be known.

The 6th, and last proposition is, that if the king (and when I say the king, I always mean the king without the concurrence of parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put.

But the present change, if it had been made *before* the 7th October 1763, would have been made recently after the cession of *Grenada* by treaty, and is in itself most reasonable, equitable, and political; for it is putting *Grenada*, as to duties, on the same footing with all the *British Leeward Islands*. If *Grenada* paid more it would have been detrimental to her; if less, it must be detrimental to the other *Leeward Islands*: nay, it would have been carrying the capitulation into execution, which gave the people of *Grenada* hopes, that if any new tax was laid on, their case would be the same with their fellow subjects in the other *Leeward Islands*.

The only question then on this first point is, Whether the king had a power to make such change *between* the 10th of February, 1763, the day the treaty of peace was signed, and the 7th October, 1763? Taking these propositions to be true which I have stated; the only question is, Whether the king had of himself that power?

It is left by the constitution to the king's authority to grant or refuse a capitulation: if he refuses, and puts the inhabitants to the sword or exterminates them, all the lands belong to him. If he receives the inhabitants under his protection and grants them their property, he has a power to fix such terms and conditions as he thinks proper. He is intrusted with making the

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treaty of peace: he may yield up the conquest, or retain it upon what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted that the king might change part or the whole of the law or political form of government of a conquered dominion.

To go into the history of the conquests made by the crown of *England*.

Ireland.

The conquest and the alteration of the laws of *Ireland* have been variously and learnedly discussed by lawyers and writers of great fame, at different periods of time: but no man ever said, that the change in the laws of that country was made by the parliament of *England*: no man ever said the crown could not do it. The fact in truth, after all the researches which have been made, comes out clearly to be, as it is laid down by Lord Chief Justice *Vaughan**, that *Ireland* received the laws of *England*, by the charters and commands of *Hen. 2.* king *John*, *Hen. 3.* and he adds an *et cetera* to take in *Ed. 1.* and the subsequent kings. And he shews clearly the mistake of imagining that the charters of the 12th of *John*, were by the assent of a parliament of *Ireland*. Whenever the first parliament was called in *Ireland*, that change was introduced without the interposition of the parliament of *England*; and must, therefore, be derived from the crown.

Vaugh. Rep.
292.*Wales.*

Mr. Barrington is well warranted in saying that the statute of *Wales*, 12th *Ed. 1st*, is certainly no more than regulations made by the king in his council, for the government of *Wales*, which the preamble says was then totally subdued. Though, for various political purposes, he feigned *Wales* to be a fief of his crown; yet he governed it as a conquest. For *Ed. 1st* never pretended that he could, without the assent of parliament, make laws to bind any part of the realm.

Berwick.

Berwick, after the conquest of it, was governed by charters from the crown without the interposition of parliament, till the reign of *Jac. 1st*.

Gascony,
Guienne,
Calais.

All the alterations in the laws of *Gascony*, *Guienne*, and *Calais*, must have been under the king's authority; because all the acts of parliament relative to them are extant. For they were in the reign of *Edward 3d*, and all the acts of parliament of that time are extant. There are some acts of parliament relative to each of these conquests that I have named, but none for any change of their laws, and particularly with regard

gard to *Calais*, which is alluded to as if their laws were considered as given by the crown.

Besides the garrison, there are inhabitants, property, and trade in *Gibraltar*: ever since that conquest the king has made orders and regulations suitable to those who live, &c. or trade, or enjoy property in a garrison town.

The *Attorney General* alluded to a variety of instances, and several very lately, in which the king had exercised legislation in *Minorca*: there, there are many inhabitants, much property, and trade. If it is said, that the king does it as coming in the place of the king of *Spain*, because their old constitution remains, the same argument holds here. For before the 7th October 1763, the original constitution of *Grenada* continued, and the king stood in place of their former sovereign.

After the conquest of *New York*, in which most of the old *Dutch* inhabitants remained, king *Charles 2d* changed the form of their constitution and political government; by granting it to the duke of *York*, to hold of his crown, under all the regulations contained in the *letters patent*.

It is not to be wondered at that an adjudged case in point has not been produced. No question was ever started before, but that the king has a right to a legislative authority over a conquered country; it was never denied in *Westminster-hall*; it never was questioned in parliament. *Coke's Report* of the arguments and resolutions of the judges in *Calvin's case*, lays it down as clear. If a king (says the book) comes to a kingdom by conquest, he may change and alter the laws of that kingdom; but if he comes to it by title and descent, he cannot change the laws of himself without the consent of parliament*. It is plain he alludes to his own country, because he alludes to a country where there is a parliament.

The authority also of two great names has been cited, who take the proposition for granted. In the year 1722, the assembly of *Jamaica* being refractory, it was referred to Sir *Philip Yorke* and Sir *Clement Wearge*, to know "what could be done if the assembly should obstinately continue to withhold all the usual supplies." They reported thus: "If *Jamaica* was still to be considered as a conquered island, the king had a right to levy taxes upon the inhabitants; but if it was to be considered in the same light as the other colonies, no tax could be imposed on the inhabitants but by an assembly of the island, or by an act of parliament."

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*7 Rep. 17. 8.

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They considered the distinction in law as clear, and an indispensible consequence of the island being in the one state or in the other. Whether it remained a conquest, or was made a colony they did not examine. I have upon former occasions traced the constitution of *Jamaica*, as far as there are papers and records in the offices, and cannot find that any *Spaniard* remained upon the island so late as the restoration; if any, there were very few. To a question I lately put to a person well informed and acquainted with the country, his answer was, there were no *Spanish* names among the white inhabitants, there were among the negroes. King *Charles* 2d by proclamation invited settlers there, he made grants of lands: he appointed at first a governor and council only: afterwards he granted a commission to the governor to call an assembly.

The constitution of every province, immediately under the king, has arisen in the same manner; not from grants, but from commissions to call assemblies: and, therefore, all the *Spaniards* having left the island or been driven out, *Jamaica* from the first settling was an *English* colony, who under the authority of the king planted a vacant island, belonging to him in right of his crown; like the cases of the island of *St. Helena* and *St. John*, mentioned by Mr. *Attorney General*.

A maxim of constitutional law as declared by all the judges in *Calvin's* case, and which two such men, in modern times, as Sir *Philip Yorke* and Sir *Clement Wearge*, took for granted, will require some authorities to shake.

But on the other side, no book, no saying, no opinion has been cited; no instance in any period of history produced, where a doubt has been raised concerning it. The counsel for the plaintiff no doubt laboured this point from a diffidence of what might be our opinion on the second question. But upon the second point, after full consideration we are of opinion, that before the letters patent of the 20th July, 1764, the king had precluded himself from the exercise of a legislative authority over the island of *Grenada*.

The first and material instrument is the proclamation of the 7th October, 1763. See what it is that the king there says, with what view, and how he engages himself and pledges his word.

“ For the better security of the liberty and property of those
 “ who are or shall become inhabitants of our island of *Grenada*,
 “ we have declared by this our proclamation, that we have
 “ commissioned our governor (as soon as the state and circum-
 “ stances

"stances of the colony will admit,) to call an assembly to enact "laws," &c. With what view is this made? It is to invite settlers and subjects: and why to invite? That they might think their properties, &c. more secure if the legislation was vested in an assembly, than under a governor and council only.

Next, having established the constitution, the proclamation of the 20th *March*, 1764, invites them to come in as purchasers: in further confirmation of all this, on the 9th *April*, 1764, three months before *July*, an actual commission is made out to the governor to call an assembly as soon as the state of the island would admit thereof. You observe, there is no reservation in the proclamation of any legislature to be exercised by the king, or by the governor and council under his authority in any manner, until the assembly should meet; but rather the contrary: for whatever construction is to be put upon it, which, perhaps, may be very difficult through all the cases to which it may be applied, it alludes to a government by laws in being, and by courts of justice, not by a legislative authority, until an assembly should be called. There does not appear from the special verdict, any impediment to the calling an assembly immediately on the arrival of the governor, which was in *December*, 1764. But no assembly was called then or at any time afterwards, till the end of the year 1765.

We therefore think, that by the two proclamations and the commission to governor *Melville*, the king had immediately and irrecoverably granted to all who were or should become inhabitants, or who had, or should acquire property in the island of *Grenada*, or more generally to all whom it might concern, that the subordinate legislation over the island should be exercised by an assembly with the consent of the governor and council, in like manner as the other islands belonging to the king.

Therefore, though the abolishing the duties of the *French* king and the substituting this tax in its stead, which according to the finding in this special verdict is paid in all the *British Leeward Islands*, is just and equitable with respect to *Grenada* itself, and the other *British Leeward Islands*, yet, through the inattention of the king's servants, in inverting the order in which the instruments should have passed, and been notoriously published, the last act is contradictory to, and a violation of the first, and is, therefore, void. How proper soever it may be in respect to the object of the letters patent of the 20th *July*, 1764, to use the words of Sir *Philip Yorke* and Sir *Clement Wearge*, "it can only

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"parliament of Great Britain."

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The consequence is, judgment must be given for the plaintiff.

ELDRIDGE *versus* KNOTT and Others.

Mere length
of time, short
of the pe-
riod fixed
by the stat.
of limitati-
ons, and un-
accompanied
with any cir-
cumstances, is
not of itself a
sufficient
ground to
presume a
release or
extinguish-
ment of a
quit rent.

UPON shewing cause why a new trial should not be granted in this case, Mr. Justice *Ashurst* reported from Baron *Eyre* as follows: this was an action of trespass for breaking and entering the plaintiff's house, and destroying his goods, Plea not guilty, Verdict for the plaintiff.

The defendants were bailiffs of *Dennis Rolle*, Esq.; lord of the manor of *East Suderly* and *Lockerly* in the county of *Wilts*; and the trespass complained of, was for taking a distress for quit-rents due to the lord, in right of this manor. Upon evidence it appeared, that till the year 1736, a quit rent had been regularly paid to the respective lords of this manor, for the tenement in question. That in the year 1738, a demand was made and refused; since which time there had been no further demand, nor had any payment been made, till within these few years, from the year 1736 to the time of the present action. That in 1736, an action was tried between the lord of the manor, and the owner of the tenement in question, for cutting down two timber trees growing thereon; when a verdict was given for the tenant: since which the owners of the tenement in question had refused to pay this quit rent, or to attend the lord's court.

Upon these facts Mr. Baron *Eyre* was of opinion, that though the claim of the defendant was not barred by the stat. of limitations, yet, that a non-payment and acquiescence for 37 years, was a sufficient ground to presume a release or extinguishment of the quit-rent; and left it to the jury to say, whether, upon the evidence, they would or would not presume it was so released or extinguished: and the jury found it was.

Mr. *Bulter* had moved for a new trial upon the ground of this being a misdirection of the judge, and that the verdict was against evidence.

Mr. Serjeant *Davy* and Mr. *Kirby* shewed for cause; that though there was no case exactly in point, yet by analogy to the reasoning and decision of the court in a variety of cases, the direction of the judge in this case, was clearly a right direction.

In 1. *Burr.* 434. a case is cited by the court, where payment of a bond was presumed within 18 years. So in *Quo. War.* circumstances may make it reasonable to refuse an information within 20 years. Even a grant from the crown has been presumed, which must be by matter of record, though such record did not appear *.

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KNOTT.* *Vide* Mayor of Hull
versus Horner,
ante, 102.

In this case there has been an acquiescence for 34 years, and such acquiescence not merely *tacit*, but after a demand made and a refusal given: therefore the defendant ought to shew some reason why, after such refusal, no subsequent demand was made, till just upon the eve of the present action; or the court will think, with the judge who tried the cause, that there is ground to presume he has released his right.

Mr. *Mansfield, contra.* In all the instances which have been mentioned, the length of time has been accompanied with circumstances: but here there are no circumstances; only mere non-payment. On the other hand, the quit-rent had been regularly paid till the year 1736. In 1738 it is demanded, and a refusal given; but the demand, at that time, is a strong proof that no conveyance or release of it had been made since the last payment; if there had been, the tenant would have assigned it as a cause of refusal; but no such reason is assigned. If no circumstances appear, the fact of non-payment alone is not of itself a sufficient ground to support the presumption contended for; if it were, the statute would be of no effect at all.

LORD MANSFIELD stopt him. The statute of limitations is a positive bar from length of time; and operates so conclusively, that although the jury and the court are satisfied that the claim set up subsists, yet they are bound by the statute to defeat the claim.

There are many cases not within the statute, where from a principle of quieting possession the court has thought that a jury should presume any thing to support a length of possession.

LORD COKE says somewhere, that an act of parliament may be presumed; and of late it has been held, that even in the case of the crown, which is not bound by the statutes of limitation, a grant may be presumed from great length of possession. It was so done in the case of the corporation of *Hull and Horner* *; not that, in such cases, the court really thinks a grant has been made; because, it is not probable a grant should have existed, without its being upon record; but they presume the fact, for the purpose and from a principle of quieting the possession.

* *vide ante*,
102.

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But there is no instance of setting up any length of time within the limitation fixed by the statute, as a *bar* to the demand : and in cases of quit-rents, like the present, the reason for carrying back the limitation to the period fixed by the statute, namely 50 years, is the stronger ; because the consideration is so trifling. Though if a real ground for supposing a release or extinguishment appeared, the smallness of the claim would have no weight. But in this case there is *mere length of time*, which, barely as *such*, ought not to be received as a *bar* : and if so, the case stands without a pretence for supposing a release or extinguishment. Because, on the other hand, the exact time when the payment was first refused is in proof ; and further, the real or more probable ground of such refusal appears ; namely, that the tenant had succeeded in an action between him and his lord ; not that the lord had released it by any conveyance, or the like ; and if so, it might be a good while before the lord might think proper to bring an action for *half a crown*. Therefore I am of opinion, that, upon the evidence, it ought not to have been left to a presumption of law, within a less time than the period fixed by the statute.

ASTON Justice. A presumption from mere length of time, which is to support a right, is very different from a presumption to defeat a right : here, the presumption is to defeat the right of the lord to a small payment of half a crown, within the 50 years limited by the statute ; and therefore, upon mere length of time, unaccompanied with other circumstances, such limitation ought not to be altered and another set up. Besides, in this case, there is reason to say, that a different foundation of refusal, than that which it is contended should be presumed, appears ; which is, that the tenant had defeated the lord in a law-suit depending between them : therefore, I am of opinion that the presumption is defective, and that a new trial should be granted.

Mr. Justice *Willes*, and Mr. Justice *Asheurst*, were of the same opinion.

Per Cur. Rule for a new trial made absolute.

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DOE ex dim. FISHAR and Wife, and TAYLOR and Wife,
versus PROSSER.

Thursday,
Nov. 22d.

UPON a rule to shew cause why a new trial should not be granted in this case, Lord Mansfield reported as follows :

This was an ejectment brought by the plaintiff for an undivided moiety of certain lands in *Enfield*, in the county of *Middlesex*. The lessors of the plaintiff claimed title under *Mary Taylor*, who was tenant in tail in common, of the lands in question, with her sister under the will of one *Perkins*. The sister was married to *Stevens*, after which, in the year 1705, there was a deed of partition, between *Mary Taylor* and *Stevens*, for the life of *Stevens* ; by which deed all the lands in *Enfield* were allotted to him, and under which he enjoyed them till the year 1734, when he died : *Mary Taylor* died some years before.

36 years sole and uninterrupted possession by one tenant in common, without any account to or demand made, or claim set up by his companion, held a sufficient ground for a jury to presume an actual ouster, of the co-tenant.

From the year 1734, one tenant in common namely, the wife of *Stevens*, had been in the sole possession of these lands, without any claim or demand by any person or persons claiming under *Mary Taylor*, deceased, the other tenant in common. No actual ouster was proved ; but upon the circumstances, I left it to the jury to say, whether there was not sufficient evidence before them to presume an actual ouster ; and supposing there was an actual ouster, in that case, the lessors of the plaintiff were barred by the statute of limitations. The jury found that there was sufficient evidence to presume an actual ouster.

Mr. *Dunning* and Mr. *Barnes*, for the plaintiff. It is a general rule of law, that the possession of one tenant in common, is the possession of both ; and there is no ground for any distinction in this case, so as to take it out of the general rule. If an actual ouster had been proved, the case would have been different. But here, no evidence whatsoever is given of any actual ouster, or of a tortious possession : on the contrary, it appears that the possession was only by permission of his companion, and as a consequence of such permission he received the rents and profits. But the bare perception of rents and profits, is no ouster ; and without an actual ouster, the statute of limitations is no bar against a tenant in common. To this purpose they cited *Reading versus Royston*, 2 Salk. 423. reported likewise in 2 Lord Raym. 830. *Fairclaim ex dim. Empson versus Shackleton*. East. 10 Geo. 3. reported since in 5 Burr. 2,604. and in 2 Blackstone Rep. 690.

Mr.

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Mr. Wallace and Mr. Widmore, *contra*, for the defendants, admitted, that where there is no *ouster*, the statute of limitations does not bar the other tenant in common. But here the jury have found an *actual ouster*, and the only question is, whether they were warranted in so doing.—As to the case of *Empson versus Shackleton*, no expulsion or *ouster* was found in that case; the single question was, whether the plaintiff was barred by the statute of limitations, after a possession of 26 years; and the court held he was not: but Lord Mansfield there said, if a question had been made at the trial, whether the plaintiff was *ousted*, it might have been a fact to have been left to the jury. Here the question was made, and the circumstances left to the jury were sufficient in point of law for them to presume an *actual ouster*; namely, an uninterrupted possession and receipt of the rents and profits for 40 years. To this point they cited 12 *Mod.* 658, 659. 1 *Lord Raym.* 310.

LORD MANSFIELD. It is very true that I told the jury, they were warranted by the length of time in this case, to presume an *adverse* possession and *ouster* by one of the tenants in common, of his companion; and I continue still of the same opinion—Some ambiguity seems to have arisen from the term "*actual ouster*," as if it meant some act accompanied by real force, and as if a turning out by the shoulders were necessary. But that is not so. A man may come in by a rightful possession, and yet hold over *adversely* without a title. If he does, such holding over, under circumstances, will be equivalent to an *actual ouster*. For instance, length of possession during a particular estate, as a term of one thousand years, or under a lease for lives, as long as the lives are in being, gives no title: But if tenant *pur antre vie* hold over for 20 years after the death of *cestuy que vie*, such holding over will in ejectment be a complete bar to the remainder man or reversioner; because it was *adverse* to his title. So in the case of tenants in common: the possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion; because such possession is not adverse to the right of his companion, but in support of their common title; and by paying him his share, he acknowledges him co-tenant. Nor indeed is a *refusal to pay* of *itself* sufficient, *without denying his title*. But if, upon demand by the co-tenant of his moiety, the other *denies to pay*, and *denies his title*, saying he claims the whole and will not pay, and continues in possession; such possession is adverse and *ouster* enough. The question then is, whether the possession in this case, after the death of *Stevens*,

in the year 1734; that is, after the particular estate ended, was a possession as tenant in common, *eo nomine* or adverse?

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It is a possession of near 40 years, which is more than quadruple the time given by the statute for tenants in common to bring their action of account if they think proper; namely, six years: But in this case no evidence whatsoever appears of any account demanded, or of any payment of rents and profits, or of any claim by the lessors of the plaintiff, or of any acknowledgment of the title in them, or in those under whom they would now set up a right. Therefore I am clearly of opinion, as I was at the trial, that an undisturbed and quiet possession for such a length of time is a sufficient ground for the jury to presume an *actual ouster*, and that they did right in so doing.

Aston Justice. There have been frequent disputes as to how far the possession of one tenant in common shall be said to be the possession of the other, and what acts of the one shall amount to an *actual ouster* of his companion. As to the first, I think it is only where the one holds possession as *such*, and receives the rents and profits on account of *both*. With respect to the second, if no *actual ouster* is proved, yet it may be inferred from circumstances, which circumstances are matter of evidence to be left to a jury. Now in this case, there has been a *sole* and quiet possession for 40 years, by one tenant in common only, without any demand or claim of any account by the other, and without any payment to him during that time. What is adverse possession or *ouster*, if the uninterrupted receipt of the rents and profits without account for near 40 years is not?

Willis Justice. This case must be determined upon its own circumstances. The possession is a possession of 16 years above the 20 prescribed by the statute of limitations, without any claim, demand, or interruption whatsoever; and therefore, after a peaceable possession for such a length of time, I think it would be dangerous now to admit a claim to defeat such possession. However strict the notion of *actual ouster* may formerly have been, I think adverse possession is now evidence of *actual ouster*: and therefore entirely agree that under the circumstances which appeared at the trial, it was very properly left to the jury to presume an *actual ouster* in this case.

Asbburst Justice. I am entirely of the same opinion. Here is a possession of near 40 years, without any claim by the lessors of the plaintiff to a share of the rents and profits, and without any acknowledgment of his right, by the other tenant in common.

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After so long an acquiescence I think the jury were well warranted to presume any thing in support of the defendant's title, and they might presume, either an *actual ouster* or a *conveyance*. With respect to the case of *Fairclaim ex dim. Empson versus Shackleton*, the present question was not properly before the court in that case. The single question there was, Whether the plaintiff was barred by the statute of limitations. The possession was a possession of 26 years; but in that case it was not left to the jury to presume either an adverse possession or an *actual ouster*. That fact therefore was not found, and it is not the province of the court, but of the jury to presume facts. But here it was left to the jury, and the jury have presumed an *actual ouster*; and I think that after a quiet uninterrupted and undisturbed possession of 40 years, they were well warranted in so doing.

Rule for a new trial discharged.

Wednesday,
Nov. 23d.

REX versus CARTER.

THIS was an information in the nature of a *quo warranto*, against the defendant, to shew by what authority he claimed to exercise the office of burghers of the borough of *Portsmouth*.

The information alleged, and it was admitted in the plea, that this office and franchise of a *burghers* has been, and still is, a place, office, and franchise of great trust and pre-eminence within the said borough, touching the rule and government of the said borough, and the administration of public justice. The plea then set forth, that within the said borough there have been, and now of right ought to be, an indefinite number of *burghesses*. That by a charter, 3 Car. 1. the mayor, aldermen, and burghesses were incorporated under the name and title of the mayor, aldermen, and burghesses of the borough of *Portsmouth*. That the charter nominated the first mayor, and twelve persons to be aldermen, and then grants "that it should and might be lawful for the mayor and aldermen, &c. or the major part of them, from time to time, and at all times then after, for ever, when, and as often as it should appear to them to be fit and necessary, to name so many and such persons to be burghesses as they should please, and to the said burghesses, so chosen, to administer an oath for their faithfully executing the said office of burghers." The plea further stated, that this charter was accepted by the then mayor and burghesses of the said borough, and that the defendant

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defendant on the 18th day of *May* 1751, was *elected* by the *major part* of the mayor and aldermen of the said borough; and that *before* he took upon himself to exercise the place, office, and franchise of such burghers, he was duly, and according to the usage of the said borough, sworn into the said office.

The replication set forth other parts of the charter, which give the corporation a power to take lands, and to make by-laws; and then stated, that the mayor, aldermen, and burghers, or the major part of them, from time to time, should have power to assemble themselves annually, every *Monday* sevensnight before the feast of *St. Michael* the arch-angel, and name one of the aldermen to be mayor. That a court of record was appointed by the said charter, to be held before the mayor, recorder, and aldermen of, &c. or any four of them; and also a court leet to be holden before the mayor, or recorder, or aldermen. And that the mayor and recorder, and every mayor for one year after his mayoralty, and three of the aldermen, to be chosen as aforementioned, should be justices in the said borough. That a court of *oyer and terminer* was also appointed by the said charter, to be held by the mayor, recorder, and three aldermen, as aforesaid. Lastly, the replication stated that the defendant at the time of his supposed election to be a burgher, &c. was of the age of *five years* and *ten months*, and *no more*.

Rejoinder. That at the time the defendant was sworn into the place, office, and franchise of one of the burghers, &c. he was of the *full age* of *twenty-one years*. To this the plaintiff demurred.

Mr. Buller, pro rege. Upon this record there are three questions. 1st. Whether the office of burgher is a judicial or a ministerial office? 2dly. If judicial, Whether an infant, such as the defendant was, is eligible to such an office? 3dly, If ministerial, Whether an infant, such as the defendant was, is eligible to such an office?

As to the *first* question, it is admitted by the plea, that the office of burgher is an office of great *trust* and *pre-eminence*, touching the *rule and government* of the said borough, and the *administration* of public justice within the same. This alone is decisive that it is a judicial office; for every thing which relates to the administration of public justice is a judicial office. But besides this, it appears by the record, that the burghers are to chuse the mayor, who is the principal officer in the borough, a justice of peace, judge of the court of record, of the court leet, and

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and of the court of oyer and terminer. Therefore upon these grounds it is clearly a judicial office.

II. Question. Supposing this is a judicial office, whether an infant is eligible to it? No authority can be cited to shew that he is eligible, but there are many which decide he is not. *Plowd. Com.* 379. 381.—9 *Co.* 48. 97. These authorities say, an infant seems capable of holding such offices as do not concern the administration of justice, but only require skill and diligence, such as the office of park-keeper, forester, gaoler, &c. But a distinction is made with regard to offices of confidence as this is, and which does concern the administration of justice.—In *Scambler versus Walter*, cited in *Cro. Car.* 556. it was held, that the grant of the office of an *under-stewardship* in possession or reversion to an infant is void; because he is incapable thereof, not having knowledge to execute it *pro commodo regis et populi*. *Co. Litt.* 3. b. *S. P.*—An infant cannot be sworn on an inquest. *Co. Litt.* 157. 172. b.—Nor be elected a member of parliament. 4 *Inff.* 47. For all these are offices of skill and confidence, or concern the administration of justice.

Upon shewing cause against this information it was said, that it has been taken for granted ever since the case in the year book, 21 *Ed.* 4. 12. *B.* that an infant may be chosen mayor. But there the infancy of the mayor was not in question, but only whether the body corporate should avoid their own deed, on account of a defect they were well acquainted with; namely, the imprisonment of the mayor; and it was held they should.

If these two points are with the prosecutor, the third is unnecessary; but if necessary to enter into it, an infant under years of discretion, is not capable of taking a ministerial office, unless he can act by deputy; nor an office where an oath is required. He cannot be an attorney, because he cannot appoint a deputy. *March, Rep.* 31. nor be sworn; *March* 92. So with respect to other acts, or offices where an oath is required. *Co. Litt.* 3. b. *Cro. Car.* 556. *Co. Litt.* 65. b. In the present case it was necessary for the defendant to take the oaths of allegiance and supremacy, and likewise the oath of office appointed by the charter faithfully to execute all things which belong to the office of burgesses. But at the time of his election, he was of such a tender age, that the law will not allow him the smallest title to discretion whatsoever, *videlicet*, under the age of seven years. At this age, an infant cannot be guilty of felony, *whatever circumstances proving discretion may appear*; for from presumption of

of law, he cannot have discretion, and no averment shall be received against that presumption. 1 H. H. P. C. 23.

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Lastly, The inconvenience and mischief of admitting infants of such an age, would be fatal to almost all the corporations in England; every borough would become a monopoly, and the instant an alderman's son had breath, he would be a burges, and no others would be admitted. If one infant may be a burges, others may; so that all, or the greater part of the burgeses might be infants in their cradles, by which means one integral part of the body would be lost or at least suspended. The king's charter would be perverted, and the power which he had delegated to many, would be confined to the hands of a few. Many corporations would be wholly dissolved; for no function in which the concurrence of burgeses was necessary could be exercised, till some of this body of childhood had attained the age of 21 years. In the case of this borough neither mayor nor justices during the infancy of the burgeses could be elected. The inconvenience of suspending the powers of corporations, were so fully seen by the gentlemen on the other side, that on shewing cause against this information, it was thought necessary by some of them to contend, there was no reason why they should not be admitted, and act during their infancy. But this I trust is sufficiently answered; for they have neither discretion to act, nor capacity to take oaths, both which are required by law.

Mr. Davenport, *contra*. An infant is eligible to the office of burges, though he cannot act till of full age.

The 1st objection is, that this is admitted on record to be an office of trust and pre-eminence, and touching the administration of justice. As to the former part of this allegation, they are words of course in every information; and with respect to the latter, it is difficult to understand what is meant by *touching the administration of justice*. For the power of the burgeses to elect the mayor, or the three justices of peace appointed by the charter to do judicial acts, is not their administration of justice. The consequence of denying it in the plea would have been, that it must have been tried; and then a special verdict must have stated to the court in what degree the office related to the administration of justice. It behoved the prosecutor therefore, in the first instance, to have shewn this to the court, if he meant to rely on it as a serious objection.

But supposing the fact to be as admitted by the plea, it does not follow that every office which affects the administration of justice,

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justice, is therefore a judicial office. The office of *sheriff* touches the administration of justice, yet in many places it is hereditary, and consequently tenable by an infant. A *serjeant at mace*, like every other officer of the court, is concerned in the administration of justice, yet his office is not judicial. Therefore every office which concerns the administration of justice is not a judicial office.

As to the capacity of infants to hold such offices, in all cases, where it is not requisite for the *elected* instantly to execute the office in person, but may act by sufficient deputy, an infant is eligible.—As to the case of *Scambler versus Walter*, cited in *Young versus Fowler*, *Cro. Car.* 556. it is in the same page held, that an infant is capable of holding the office of *register* of the diocese of *Rocheſter*. It is taken for granted too in that case, that an infant may be *warden* of the *Fleet*: now the office of *warden* of the *Fleet* greatly touches the administration of justice. There clearly, therefore, is nothing in that objection.

The case in the year book, 21 *Ed.* 4. is in favour of the defendant, for it is there said a corporation may elect an infant mayor. If he may be *mayor*, *a fortiori* he may be a *burgess*; for in this corporation he cannot be mayor without first having served the office of *burgess*.

As to the incapacity of infants to be elected members of parliament, the *stat.* 7. & 8 *Will.* 3. is the first statute which prohibits their being chosen. The only inference, therefore, is, that before that time they were eligible, otherwise the statute was unnecessary. With respect to the oath required by the charter no such oath is required to be taken by a *burgess*, but only a power given to the mayor and aldermen, to administer an oath; for the words are “that it shall and may be lawful for the mayor and
“ aldermen to name so many and such persons to be *burgesses*
“ as they should please, and to the said *burgesses* so chosen, to
“ administer an oath, &c.”

The crown might in the original grant have nominated an infant to be mayor or *burgess*; and if so, those to whom the right of the crown is delegated, have the same power. But supposing an oath were necessary, an infant who is chosen a *burgess* is not obliged to be instantly sworn in. If he is adult at the time he takes upon himself to act, it is sufficient. Persons who are resident abroad, and consequently cannot be immediately sworn in, are nevertheless eligible. In many corporations persons are *burgesses* by birth. Titles by servitude, or marriage
of

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of a burges's daughter, are not unfrequent before the age of 21. And in some it is customary to swear them in, at the age of 20, as in *Newcastle*. In short, no principle of law is more clear, than that an *inchoate* right to be a burges may vest in an *infant*, and where such right does vest, a *mandamus* will lie to swear him in, at the legal age of 21, or such other time as custom may have established. No authority has been cited to the contrary; all the objections which have been made, are founded upon matter subsequent to the act of their being elected; but they are not sufficient to bar the right of an infant, who has by law a capacity to take any thing which does not affect the commonwealth. In this case it is apparent upon the record, that there can be no necessity for his acting as soon as he is elected; for the number of burgeses are by the charter made *indefinite*; and if the number of infants should be too great, a sufficient number of persons qualified to hold the necessary offices of the corporation, may at any time be added; consequently no inconvenience can arise from infants being elected, and as there is no law against it, the defendant is well entitled.

Lord *Mansfield*. A great variety of learning has been gone into on both sides, which seems to me unnecessary to be taken into consideration upon the present question; the decision of which depends upon a very short point.

The argument begins as early as the time of *Ed. 4.* with mootings about the personal incapacity of the members of this corporation. The answer to all that is, it is not the act of the *persons*, but of the *body corporate*; therefore the act is good.

Another ground of argument that has been made is, the incapacity of infants to become grantees of offices; and that there are many things intermixed with the administration of justice which an infant is of capacity to take by grant. But that is not the question.

The next head of argument is, Whether this office of burges is not an office touching the administration of justice. It would be a pretty nice point if it could be brought to that. But the case does not depend upon that question. Let us see then what the true question is. This is a corporation which derives its constitution under a charter from the king, and their whole power arises from it. It follows therefore that they are bound to act according to the powers and directions which it contains.

The question then is, Whether the defendant in this case being elected at the age of *five* years old, and sworn in at *twenty-one*,

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Mr. *Davenport* has said there may be *inchoate* rights, to be completed when the parties are of age; and cases have been alluded to of children born with a right to be admitted at 21, on payment of a sum of money, and also titles by servitude or marriage. Clearly there may be such *inchoate* rights; but the question is, Whether the king has by this charter given the corporation a power to grant *inchoate* rights to infants, to be put in execution upon their attaining the age of 21? If he has not, there is an end of the defendant's title. Let us see then what the terms of the charter are.

The king enables the mayor and aldermen, or the greater part of them, to chuse as many burgesses as they shall think proper, and to administer to them the oath of office, and till sworn they are not complete burgesses. Upon an information they must be sworn in. Did the king mean, when he directed they should be sworn in, that they should swear in sucking infants? It is said a corporation may chuse absent members: if fairly, and consistent with the charter, they may. But they cannot chuse an absent member collusively: and in the case of *Cambridge*, the court was of opinion that it was a fraudulent election. There is no more in this case than this, that the king has given them a power to chuse and swear in burgesses; and the question is, Whether he gave them a power to grant an *inchoate* right, when no oath could be administered to them. I am clearly of opinion that no such power is given by the charter.

Aston Justice. The question does not depend upon the capacity or incapacity of infants to take; but whether this corporation are empowered by their charter to grant *inchoate* rights to infants.—As to the case in the year book, 21 *Ed.* 4. 12. the ground upon which the court held the plea to be good was, that the bond was the act of the corporation, not the act of the mayor; and that the dures under which he acted, was the dures of the whole body: consequently the bond was void.

In most charters the direction as to the election of burgesses is, that the mayor, &c. shall chuse one or more of the *discreet* men of the borough, to be a burgess or burgesses. But can it be said, that an infant of five years of age, is or can be supposed to be such *discreet* person? The words of the present charter are, that “they may, as often as it shall appear to them

“ to

"to be *fit* and *necessary*, elect so many and *such* persons to be burgesses as they should please, and to such persons so chosen, "shall *administer an oath* faithfully to execute the office." This supposes the mayor and aldermen, &c. to exercise their judgment in electing persons to be burgesses; and in respect of the oath, the ELECTION and SWEARING are clearly intended to be *simul et semel*. But what is the present case? Not an *election*, but a contingent *nomination*, which perhaps might never have taken effect; because the party might not have lived. Other persons might, at such a distance as 16 years, be to swear him in; disputes might arise as to his being the same person, besides involving many other inconveniencies. I am clearly therefore of opinion, upon the true construction of this charter, that the act must be the act of the corporation for the time being, to be executed presently by them; and that it was not intended they should have a power to nominate for many years to come; such nomination to be completed, if the party should at such future time happen to be in *esse*, and disposed to take the office upon him.

Willes Justice. I am clearly of the same opinion; there never was a plainer case.

Ashurst Justice. I think this a very clear case. The power which the charter gives of electing burgesses in this borough, is to be exercised when and as often as it shall appear to the mayor, aldermen, &c. to be *fit* and *necessary*. By that is meant, fit and necessary for the present purposes of the corporation; and the persons intended, such as are capable of taking upon themselves the immediate execution of the office: not persons to be nominated only, and who might or might not act, or be capable of acting in future, as circumstances and events might turn out.

Judgment for the king.

JONES *versus* COOPER.

THIS was an action for goods sold and delivered at the instance of the defendant. Plea, *non assumpsit*, and verdict for the *defendant*. Upon a rule to shew cause why a new trial should not be granted, the case appeared from the report of Mr. Justice Nares, who tried the cause, to be shortly this: The

delivery of the goods, is a collateral undertaking within the statute of frauds.

Q 2

defendant

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Friday,
Nov. 25th.

A parcel; to-
mise to pay
for goods sold
to B, if B.
did not pay
for them,
though
made before

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defendant had frequently given written orders to the plaintiff to deliver goods of different kinds to one *Smith*, her son-in law; in all of which she undertook to be answerable for the payment. These had been all punctually discharged. But the goods upon which the present question arose were delivered to *Smith*, in consequence of a *parol* order and a *parol* promise by the defendant in these words, "*I will pay you, if Smith will not.*"—That the undertaking was before the delivery of the goods; but that *Smith* was entered as the debtor in the plaintiff's books.

Mr. *Mansfield* and Mr. *Buller*, in support of the rule. The single question is, Whether the promise which is the ground of the plaintiff's action, is to be considered as a collateral promise within the statute of frauds; or whether it is not an original undertaking upon the credit of which the goods were supplied to *Smith*?

The words of the *stat. 29 Car. 2. c. 3.* are, "That no action shall be brought whereby to charge a person upon any special promise to answer for the debt or default of another, unless the agreement upon which such action is brought, shall be in writing." This is not an undertaking for the debt of another; but an original contract upon the confidence of which the debt first accrued: Therefore not within the statute; and so it was held in *Mawbrey versus Cunningham*, Sittings after *Hil. Term 1773*. There goods were delivered to *A*, at the request of *B*, who said *he would see them paid for*. Lord *Mansfield* held, that as the promise was before delivery of the goods, it was not within the statute, because at the time of the promise there was no debt at all.

Mr. *Dunning contra*. The case cited, was for goods sold at the defendant's request, and a promise by the defendant to pay for them. No doubt if goods be delivered to *A*, upon the request of *B*, and *B* promises to pay for them, they are goods sold to *B*. But in the present case, the defendant was to pay only in case *Smith* (to whom the goods were sent) did not pay for them; it is therefore a conditional promise. *Smith* was made debtor for them; and considered as such by the plaintiff, and therefore he should have used due diligence to recover against *Smith*, before he had recourse to the defendant.

Lord *Mansfield*. The general distinction is a clear one, and upon that distinction the case which has been cited was determined. Where the undertaking is *before delivery*, and there is a direction

a direction to deliver the goods, and I will see them paid for, it is not within the statute of frauds. But there may be a nicety where the undertaking is before delivery, and yet conditional as this is. It turns singly upon the undertaking being *in case* the other did not pay.—We will look into it.

The next day Lord *Mansfield* delivered the unanimous opinion of the court as follows:

We are all of opinion upon the authority of the cases in the books, that the promise by the defendant in this case, to pay, if *Smith* did not, is a collateral undertaking within the statute of frauds; and it is so clear that it would only be mispending time to go through the cases, or to say much about it.

Rule for a new trial discharged.

1774.

JONES
versus
COOPER.

REX versus BEACH.

THE defendant in this case had been convicted of perjury in an affidavit. Upon shewing cause why the judgment should not be arrested, exception was taken by Mr. *Dunning* and Mr. *Buller*, in support of the rule, that there appeared a material variance between the indictment and the affidavit; for in the affidavit the defendant swore, that “he understood and “believed, &c.” whereas the assignment of the perjury in the indictment was, “that he had falsely sworn, that he understood “and believed, &c.” omitting the letter *s*.

Indictment
for perjury.
Variance in
the word
underwood
for under-
stood, held
not mate-
rial.

In support of this exception it was insisted, that this being a variance in the material part of the charge, namely, in the assignment of the perjury itself, was fatal, and could not be cured by verdict; and cited *Queen versus Drake*, 2 *Salk.* 660. — *Hutton* 56. *Cro. Jac.* 133. 5 *Rep.* 45. 2 *Lord Raym.* 1224.

Cur. advisare vult.

Lord *Mansfield* now delivered the unanimous opinion of the court as follows. This was a motion in arrest of judgment on an indictment for perjury in an affidavit; upon the ground of a material variance between the affidavit and the indictment, the letter *s* being left out in the word understood: and it comes before the court after the jury have read it “understood.” We have looked into all the cases upon the subject; some of which go to a great degree of nicety indeed; particularly the case in *Hutton* 56. where the word *indicari* was written for *indictari*; whereas it should have been written with an abbreviation *indictari*: but that case is shaken by the doctrine laid down in 2 *Hawk.* 239.

1774.

REX
versus
BEACH.

The true distinction seems to be taken in the case of the *Queen versus Drake*, 2 Salk. 660. which is this; that *where the omission or addition of a letter does not change the word, so as to make it another word, the variance is not material.* To be sure, a greater strictness is required in criminal prosecutions than in civil cases; and in the former a defendant is allowed to take advantage of nicer exceptions. But this is a case where the matter has been fairly tried, and where the omission of the letter *s* certainly does not change the word. Therefore we are all of opinion, that the jury were very right in reading it "understood."

Rule for arresting the judgment, discharged,

Same day.

GILBERT *versus* BURTENSHAW.

In personal
suits, the
court will
seldom
grant a new
trial for
excessive
damages.

THIS was an action for maliciously indicting the plaintiff for perjury.—The second and third count were for defamation, in saying the plaintiff was a perjured knave and scoundrel, after acquittal, and he would prove it.

Upon shewing cause why a new trial should not be granted on the ground of excessive damages, it appeared by the report of Lord Chief Baron *Smythe*, before whom the cause was tried, that his Lordship directed the jury, in case they were of opinion that there was malice, and no probable cause, to find a verdict for the plaintiff; but if they thought there was a probable cause, then to find a verdict for the defendant. The jury found a verdict for the plaintiff, damages 400*l.* and his Lordship reported that he was very well satisfied with the verdict.

Mr. *Dunning*, Mr. *Lade*, and Mr. *Morgan*, in support of the rule, were instructed to say, that the acquittal upon the indictment for perjury was by mistake, and not upon the merits: and in respect of the damages they insisted, that as no special damage was laid or proved, the sum of 400*l.* was much too severe and excessive.

Mr. Justice *Willes*, who tried the indictment against *Gilbert* the plaintiff, explained what passed at that time, and said, that after a trial of six hours it was an acquittal upon the merits, and very much to his satisfaction.

Lord *Mansfield*. This rule comes before the court singly on the judge's report.—It is not an application on the ground of surprise or of new evidence, that has been discovered since the trial; nor upon the ground, which counsel were instructed to mention

mention to the court when it was first moved, namely, that from the hurry of summing up, the jury were misled to think, that declarations accusing the plaintiff of perjury were left to the jury, when in fact no such evidence was given. By the report it appears that that suggestion is totally untrue; and that there was strong evidence of such declarations being made by *Burtenshaw*, after the trial of the indictment.

The verdict is taken upon two counts: upon the first, "for maliciously indicting the plaintiff of perjury;" and upon the second, for calling him "a perjured rascal, and saying he would prove it." There was evidence in support of both counts. Therefore, the whole ground of the application rests on the point of excessive damages. I should be sorry to say, that in cases of personal torts, no new trial should ever be granted for damages, which manifestly shew the jury to have been actuated by passion, partiality, or prejudice. But it is not to be done without very strong grounds indeed; and such as carry internal evidence of intemperance in the minds of the jury. It is by no means to be done where the court may feel, that if they had been on the jury they would have given less damages, or where they might think the jury themselves would have completely discharged their duty, in giving a less sum. Of all the cases left to a jury, none is more emphatically left to their sound discretion than such a case as this: and unless it appears that the damages are flagrantly outrageous and extravagant, it is difficult for the court to draw the line. But in this case, where the defendant has been guilty of repeated defamation against the plaintiff, after a fair trial and acquittal upon a malicious prosecution, it is impossible for the court to go into a nice examination and admeasurement of what ought to have been the damages.

ASTON, Justice.—I am clearly of the same opinion; and in the present case I should doubt, even if it stood upon the second count only, whether the court ought to interpose on account of the largeness of the damages, in favour of a man who has been guilty of charging another with so foul a crime as is there laid, and declaring in public that he would prove it upon him.

Mr. Justice *Willes* and Mr. Justice *Ashurst* were of the same opinion

Rule for a new trial discharged.

1774.

GILBERT
versus
BURTEN-
SHAW.

1774.

Saturday,
Nov. 26.MACE *versus* CADELL.

The enact-
ing part of
sect. 11.
stat. 21.
Jac. 1.
c. 19. is not
restrained
by the pre-
amble, but
extends to
goods of a
third person,
which he
permits a
trader, who
afterwards
becomes
bankrupt,
to be in the
possession of,
and to sell as
his own;
as well as
to the bank-
rupt's origi-
nal property,
so kept and
disposed of
by him as
his own,
after having
conveyed it
to a third
person.

TROVER for goods. Upon shewing cause why the ver-
dict given in this case for the plaintiff should not be set
aside, and a non-suit entered; the court took time to consider.
And now Lord Mansfield delivered the unanimous opinion of the
court as follows:

The plaintiff, *Mace*, kept a public house, had a licence, and
said she was married to one *Penrice*. She went to the *Excise-
Office*, had his name entered in the books, with a note in the
margin "*married*." *Penrice* had the licence, and continued in
possession of the house and goods, from that time till he ab-
sconded, and went to *Pimlico*, which was an act of bankruptcy.
Mace, the plaintiff, first claimed the goods in question, under a
bill of sale from *Penrice*; but afterwards as her own original
property, and denied that *Penrice* and she were married. *Penrice*
was examined, and he said that it was not till within three
weeks before he went away that he knew whether he would
marry her or not.

At the trial a doubt occurred to me, whether this case did
not come within the *stat. 21 Jac. 1. c. 19. sect. 11*. For the pos-
session which the bankrupt had of these goods, was emphatically
a possession of them *as his own*, and kept by him as such. It
was suggested, that there was a similar case depending in the
C. B. where the question was, Whether the enacting clause of the
eleventh section extends further than the preamble of that sec-
tion, so as to include goods not originally the bankrupt's. The
preamble only says, "And for that it often falls out that many
persons before they become bankrupts, do convey their goods
to other men, upon good consideration, yet still do keep the
same, and are reputed owners thereof, and dispose of the same
as their own." But the words of the enacting part are as fol-
lows: "Be it enacted, that if any person, at such time as he
shall become bankrupt, shall, by the consent of the true owner,
&c. have in his possession, &c. any goods, &c. whereof he
shall be reputed owner, the commissioners shall have power
to sell the same in like manner as any other part of the bank-
rupt's estate." These words clearly extend to other persons
goods, as well as to those which were originally the bankrupt's
property. For the sake of conformity, we were desirous to

stay till the court of *Common Pleas* had given their opinion. But that case we understand is made up.

1774.

We have considered the general question; and to be sure there is a variety of mootings in the books without any determination.

 MACE
versus
 CADELL.

But if the statute meant to comprehend nothing more than is contained in the preamble, it means nothing at all. Because even *before* the statute, if a man had *conveyed* his *own* goods to a third person, and had kept the possession, such possession would have been void, as being fraudulent according to the doctrine in *Twine's* case, 3 *Rep.* 81. At the same time, the statute does not extend to all possible cases, where one man has another man's goods in his possession. It does not extend to the case of factors or goldsmiths, who have the possession of other men's goods merely as trustees, or under a bare authority, to sell for the use of their principal; but the goods must be such as the party suffers the trader to sell *as his own*. Therefore, upon this ground we are all of opinion, that the verdict ought to be set aside.

But, in the consideration of this general question another point appeared, upon which we are equally clear; namely, that after a solemn declaration by the plaintiff that she was married to *Penrice*, and that these were the goods of *Penrice* in her right, she shall never be allowed to say, that she was not married to him, and that the goods were her sole property. On either ground, therefore, the verdict is wrong. If such a practice were to be allowed it would be laying a trap for persons to deal with bankrupts.

Per Cur. Let the verdict be set aside, and a non-suit entered.

THE END OF MICHAELMAS TERM.

1775.

HILARY TERM

15 GEORGE III. B. R. 1775.

Saturday,
Jan. 27th.

MORGAN et UXOR *versus* JOHN GRIFFITHS, and
Others.

Devise to
T. G. for
and during
his natural
life, and af-
ter his de-
cease to his
heirs and af-
signs for
ever, for
want of
such heirs,
to T. E.
his heirs
and assigns
for ever.
T. G. has
only an es-
tate tail.

THIS was a case out of *Chancery* in substance as fol-
lows:

Thomas Griffiths being seised in fee of the premises in ques-
tion, by his last will amongst other things gave and devised as
follows:

“ I do give, bequeath, and devise two parts to be divided in
“ three parts, of all that tenement and lands situate, lying, and
“ being within the parish of *Abergivilly*, and county of *Car-*
“ *marthen*, commonly called and known by the name of *Bwlch*
“ *Gwynn*, unto *Thomas Griffiths*, my grandchild, for and during
“ his natural life, and after his decease, to his right and lawful
“ heirs and assigns, for ever; and for want of such lawful
“ heirs, I do give the said lands, as before expressed, to *Thomas*
“ *Evan*, son of *Evan Thomas*, of *Penllwyn*, the lands to his
“ heirs and assigns for ever.”

The testator died soon after, without revoking or altering his
said will; whereupon the said *Thomas Griffiths*, his grandson, en-
tered into possession of the premises, and being seised as afore-
said, by lease and release of the 30th and 31st *January*, 1727,
previous to his marriage with *Dorothy* his first wife, conveyed
the same to the use of himself for life, remainder to his wife for
life, remainder to the heirs of his body on the said *Dorothy* to be
begotten, remainder to his own right heirs.

Dorothy

Dorothy died, leaving *Rachael* (the wife of the plaintiff) her only child, by her said husband, who afterwards married a second wife, by whom he had issue the defendant *John Griffiths*, and several other children, and died.

Upon his death, the defendant *John* entered on the premises, claiming them as tenant in tail, under the will of his great-grandfather, *Thomas Griffiths*, the testator.

The plaintiff and his wife claimed under the settlement of *Thomas Griffiths*, her father, conceiving that he took an estate in fee, under the will of the testator, *Thomas Griffiths*, his grandfather.

Thomas Evan, the devisee in remainder in the said will, was another grandson of the testator, and survived him.

The question submitted by the Lords Commissioners, for the opinion of this court was, what estate the grandson *Thomas Griffiths*, took in the premises by the will of the said *Thomas Griffiths*, the grandfather?

Mr. *Wallace*, who was for the plaintiff, acknowledged the rule of law to be clearly settled; that where one devises to *A.* and his heirs generally, which would convey a fee, yet if there be a remainder over, for want or upon failure of such heirs, to a person who might take the estate as heir, the word heirs is restrained to heirs of the body, and *A.* has only an estate tail by such devise; consequently in the present case the defendant was clearly entitled.

LORD MANSFIELD.—There can be no question about it, and accordingly the court certified as follows:

Having heard counsel on both sides, and considered the above case, we are of opinion that the grandson *Thomas Griffiths* took an estate tail in the tenement, called *Bwlch Gwynn*, by the will of the said *Thomas Griffiths*, the grandfather.

ROE ex dim. BOWES *versus* BLACKETT.

Tuesday,
Jan. 31st.

IN ejectment for certain lands situate in the township of *Newnham*, in the County of *Northumberland*, the jury found a special verdict, stating in substance as follows: that *Christopher Blackett* was seised of the tenements, with the appurtenances, in the declaration mentioned, in his demesne, as of

To make a devise of lands without any limitation a fee, such a manifest intention must

appear that the testator meant to give a fee, as may satisfy the conscience of the court, in pronouncing it such. If it is barely problematical, the rule of law must take place.

fee;

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MORGAN
versus
GRIFFITHS.

1775.

BOWES
v. JONES
BLACK-
ETT.

fee; and was likewise possessed of several lands and tenements held by him under leases for years, lying contiguous to the said freehold tenements; and which said leasehold lands and tenements were devised along with the said freehold tenements without distinction, to the several occupiers thereof, who enjoyed the said leasehold and freehold tenements, *without knowing or inquiring which were leasehold and which were freehold*: and being so seized on the 24th day of *August*, 1738, he made his last will and testament in writing, duly executed and attested to pass real estates, and thereby devised as follows: "I give, bequeath, and devise to my dearly beloved wife, *Elizabeth Blackett*, all my freehold and leasehold messuages, houses, lands, and tenements, situate at *Newnham*, in the county of *Northumberland*, and elsewhere, and all my estate and interest therein, *for and during her natural life*; and I do hereby constitute and appoint *John Foster*, of *Eddeston*, in the said county of *Northumberland*, Esquire, trustee for my said wife during her natural life aforesaid; and from and after her decease, I give, devise, and bequeath, the said messuages, houses, land, and tenements, to my sisters in law *Mrs. Elizabeth Smart*, and *Mrs. Martha Maria Bellasyse*, of *Haughton upon Skien*, in the county of *Durham*, as tenants in common: But in case my mother *Mrs. Alice Bellasyse*, shall give or cause to be given, any disturbance or molestation to my said wife, about the possession and enjoyment of my said messuages, houses, lands, and tenements, then my mind and will is, that the same shall go to my kinsman *William Blackett*, of the town and county of *Newcastle upon Tyne*, his heirs and assigns for ever: and I give and bequeath the said messuages, houses, lands, and tenements, to him accordingly, and do make him my sole heir thereof. And my mind and will further is, and I do hereby charge and make chargeable my said estate, with the payment of all my just debts and funeral expences, and order the same to be paid out of the yearly profits of my said estate, by my said wife. And I do further give and devise all my personal estate whatsoever, to my dearly beloved wife aforesaid, and do hereby make her sole executrix of this my last will and testament."

That the testator died on the 27th *August*, 1738, without issue, leaving *John Blackett*, since deceased, father of the defendant *John Blackett*, his heir at law. *Elizabeth Blackett*, the testator's widow, immediately after his death entered on the premises. That *Martha Maria Bellasyse* intermarried with
Richard

Richard Bowes, who purchased the reversion of the one undivided moiety of the premises of *Elizabeth Smart*; and being so seised died intestate, leaving *Thomas Bowes* the lessor of the plaintiff, his heir at law. That afterwards, on the 13th July, 1767, *Martha Maria Bowes*, widow of the said *Richard Bowes*, died seised of the reversion of the aforesaid moiety of the premises, upon whose death the same descended to the said *Thomas Bowes*, the lessor of the plaintiff. That at the time of the testator's death, the said testator was of the age of 27, the said *Elizabeth Blackett*, his widow, of the age of 34, *Elizabeth Smart* of the age of 22, and *Martha Maria Bellafaye* 18. That the defendant was heir at law of the testator. The question was, whether the half-sisters took an estate for life or in fee?

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BOWES
versus
BLACK-
ETT.

This case was argued twice; first in *Michaelmas* term by Mr. *Chambre*, for the plaintiff, and Mr. *Davenport*, for the defendant; and again in this term by Mr. *Wilson*, for the plaintiff, and Mr. *Dunning*, for the defendant. For the plaintiff it was argued that the half-sisters took a fee. 1st, The fact found by the special verdict of the freehold and leasehold lands, being so intermixed as to be undistinguishable by the tenants, and being coupled by the testator in the same devise, clearly shews his intention was to dispose of all his estate. His two half-sisters were nearer of kin to him than his heir at law; his disposition, therefore, to them was but reasonable, and if his intention to do so is apparent, the court will carry it into execution, though there are no technical words. The circumstances that shew he meant his sisters should take a fee are, that having first charged this estate with the payment of his debts, he makes this material distinction between the two bequests; he directs his wife to pay only out of the *rents* and *profits*, but leaves it a *gross charge* in the devise to his sisters. Now it is an established rule of law, that where a gross sum is charged, though there are no words of limitation, the devisee shall take a fee, for otherwise he might reap no benefit from it; but where it is payable out of rents and profits it is only an estate for life; 2dly, Where a man uses no words of limitation, it is reasonable to presume that he meant more than an estate for life; especially where in the immediate precedent devise, meaning to give his wife an estate for life only, he expressly says, "*for and during her natural life.*" But further, the fee of the leasehold clearly passes without any limitation at all; and therefore the freehold must pass too, or the manifest intention of the testator to unite the whole would

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versus
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would be frustrated.—Again, the words, “*All my estate and interest therein*,” are material ; for no doubt, the testator had some meaning in making use of them ; but if applied to the life estate to his wife, they are nugatory ; they are equally so in respect of the devise to *William Blackett*, because of the additional words “*his heirs for ever* :” Therefore the only way of giving sense to this expression, is by transposing them, or considering them as repeated, in the devise to his sisters. Lastly, it is plain that he did not intend his heirs should take in any event, for in case of disturbance by the mother, he gives the estate over to *William Blackett*. The natural inference from this is, that he hoped to prevent any disturbance from the mother by making the daughters suffer in consequence of it. But if the devise to them is construed an estate for life, it would be punishing his heir, which certainly could never be his intention in inserting that clause, if he had meant his heir should receive any benefit.

For the defendants *contra*. An heir at law shall not be disinherited without express words, or a clear and manifest intent apparent upon the face of the will. A *conjectural* intention is not sufficient, nor an intention which the court may suppose the testator ought to have had, if it is not supported by a necessary implication. Therefore there must either be words of limitation or something in the will tantamount ; but those *tantamount* words must be *clear*. In this case there are no words of limitation, nor is there any thing to supply them, so as to satisfy the court even of a probable intention to give more to the half-sisters than an estate for life. But conjecture and probability are not sufficient.

Afterwards, on *Friday* the 3d of *February* in this term, Lord *Mansfield*, after stating the case, delivered the opinion of the court as follows.

The question arising out of these facts stated in the special verdict, and which is reserved for the opinion of the court, is, “*Whether the estate given to the sisters in law, as tenants in common, is an estate for life or in fee.*”

There are no words of limitation added to this devise ; and therefore it is clear by the rule of law, that it is only an estate for life, unless it can be found from the whole of the will taken together and applied to the subject matter of this devise, that the testator's intention was to give a fee. Indeed, if from the whole of the will so taken together and applied to the subject matter it can be collected that the testator meant to give a fee,

it has been very properly, and very truly admitted at the bar, that it ought to be so construed in order to give effect to such intention.

Several arguments have been used to shew that such intention may be collected in this case. In the first place, stress is laid on the circumstance of its being found by the special verdict, that the testator's lands were partly freehold and partly leasehold; that they lay contiguous to and intermixed with each other, so much so, that even the tenants did not know how to distinguish them: and yet that the testator has included both indiscriminately in the devise in question. From thence it is argued, and I think fairly, that the testator meant his freehold and leasehold property should go together. But if that be so, it is insisted further, that this devise, though without words of limitation, will carry the *fee simple of both*. For it would clearly pass the fee of the *chattels* if they stood *alone*; and, therefore, consistent with the intention of the testator to unite the whole of his property and make it *one* estate, it must be construed to pass the *freehold* too. But that argument turns in a circle; for it may as fairly be argued, that the devise of the freehold, which without words of limitation is by law an estate for life only, should carry the leasehold after it.

The second argument is, that "he has charged this estate with the payment of his debts;" and that where an estate is given to *J. S.* on condition of his paying a gross sum of money, it is a fair inference from the burthen imposed upon him, that the testator intended him in all events a benefit; which can only be certain from his taking a fee. But that argument does not hold in the present case; for though the estate is charged with the payment of debts; yet here they are ordered to be paid out of the rents and profits, by his wife, who was a young woman of 34. No certain inference, therefore, can be drawn from thence.

The third argument is drawn from the words which follow the description of the messuages preceding the devise to the wife for life; namely, "all my estate and interest therein," and from thence it has been insisted, that no words of limitation were necessary. But these words added precedent to an estate for life, can have no meaning at all; and it is remarkable that they are left out in the devise to his half-sisters, which shews the testator meant nothing by using the expression in the devise to his wife.

These

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BLACK-
BURN.

These are the several observations that have been made ; from whence it has been argued, that the testator's intention was to give his half-sisters a fee. But I am not able to find in this will, any circumstances sufficiently certain to satisfy my mind that the testator really meant a fee. As to the clause of disturbance by the mother, and the devise to *William Blackett* thereupon, I am very doubtful upon conjecture, whether the testator's idea was barely to give *William Blackett* his estate, in case of an effectual disturbance, and to give him a fee upon that contingency only. For in that case it must have happened during the wife's life ; it must have happened, therefore, before the estate could have gone to the half-sisters. The words are however very incorrect and inaccurate ; and it is strange that barely on that contingency, depending upon the act of the mother, he should make a fee depend. I rather think his own intention might be this—To make his kinsman, *William Blackett*, his heir in reversion, after his half-sisters ; but in case of disturbance, that then he should take it immediately in possession, and not in reversion, which seems to be the reason of his saying “ I make him my *sole* heir thereof.” But I am not satisfied in my own mind, that even that is the right construction, and, therefore, say it merely upon conjecture. It is however enough for our judgment that the construction is doubtful ; for, in order to make a devise of lands *without any limitation* added, a fee, such an intention must appear as is sufficient to satisfy the conscience of the court in pronouncing it such : if it is barely problematical, the rule of law must take place. No inference in this case is to be drawn, the one way or the other, from the circumstance of the testator's knowing how to give, for that does not appear.

Therefore, it being very doubtful whether the testator did mean a fee, or not, our determination must go by the rule of law, namely ; that there being no words of limitation, the half-sisters take an estate for life only, and consequently there must be judgment for the defendant.

Judgment for the defendant.

1775.

REX *versus* KEMPSON.*Wednesday,*
Feb. 1st.

THE defendant had been convicted in several penalties upon the *game laws*. In the conviction the appearance of the defendant and the evidence were set forth as follows:

Afterwards upon the aforesaid day, and in the year aforesaid, he, the said *Samuel Kempson*, having been duly summoned, appeareth, and is there *present* before me in order to make his *defence* against the said charge and information, and having heard the same is asked by me the said justice, if he can say any thing for himself, why, &c. Who pleadeth that he is *not guilty* of the said offence; nevertheless, on the said 14th day of *September*, one credible witness, *Richard Cratorn*, now cometh before me, the said justice, &c. and upon his oath deposeth and saith, that on *Wednesday* the 14th day of this instant *September*, he saw *Samuel Kempson*, &c. &c. and thereupon the said *Samuel Kempson*, before me the said justice, by the oath of one credible witness aforesaid, according to the form of the said statute aforesaid, in such case made and provided is convicted of the said offence, &c.

In a conviction it is sufficient if enough appears, to shew that the evidence was given in the presence of the defendant; without stating that he was actually present at the time.

Upon the record being removed by *certiorari*, Mr. *Chambre* objected, that it did not appear upon the face of this conviction, that the evidence was given in the presence of the defendant, which it ought to be, that the party accused may have an opportunity of cross-examination.

Mr. *Poole*, *contra*, insisted that it was not necessary to state that the evidence was given in the presence of the party accused. It is sufficient if it appears from what is stated that he was present at the time. Now here it is stated that the defendant appeared, pleaded not guilty, and then the evidence was gone into; in such a case the court will presume that he was present at the time, and cited *Rex versus Aiken*, 3 *Burr.* 1785, as in point.

Aston Justice. Enough appears upon this conviction, to shew that the witness was examined in the presence of the defendant. It must be supposed that all that passed was at one and the same time.

Per Cur. Let the conviction be affirmed.

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Friday,
Feb. 3d.

In replevin upon a distress for rent, plea in bar, that the defendant pulled down a summer-house, whereby the plaintiff was deprived of the use thereof, without saying that he was expelled or put out of the same, is insufficient; being a mere trespass, but no eviction.

HUNT *versus* COPE.

ERROR from a judgment of the court of *King's Bench*, in *Ireland*, in an action of *replevin*, brought by the plaintiff, now defendant in error, for taking certain goods of the said *Henry Cope*, out of his dwelling-house, and detaining them, &c.

The defendant, the now plaintiff in error, avowed the taking for rent arrear due by the said *Cope* to the said defendant, for certain premises in the avowry mentioned.

The plaintiff pleaded 1st, That there was not any rent due to the defendant out of the premises, at the time of the taking, &c. upon which issue was joined. 2dly, That long before the taking of the goods, to wit on the 1st of *April* 1770, the defendant with force and arms unjustly and unlawfully entered upon the garden part of the messuage or tenement in the plaintiff's possession, and did then and there with like force and arms unjustly and unlawfully break and pull down the roof and ceiling of a summer-house, part of the said premises, and tore up the benches therein, by means whereof the plaintiff had been deprived of the use of the summer-house, from the said 1st of *April*, 1770, until the day of taking of the said goods, &c.

To this plea the defendant demurred, and the plaintiff joined in demurrer.

The Court of *King's Bench* in *Ireland*, gave judgment upon the demurrer for the plaintiff, whereupon the defendant brought this writ of error to reverse the judgment, and assigned the general errors, and the plaintiff joined in error.

Mr. *Dunning*, for the plaintiff in error, stated the question to be, Whether the facts set forth in the plea amounted to an eviction of the defendant? If not, which he contended they did not in this case, they were no suspension of the rent, but a mere trespass, and cited *Sir Thomas Jones*, 148. *Roper versus Lloyd*, as in point; where, in covenant for non-payment of rent, the lessee pleaded, that the plaintiff had taken away a pent-house, fixed to the premises, and the court held it a trespass only, and no suspension.

Mr. *Norton*, *contra*, insisted that the facts in the plea did amount to an eviction; for here an actual entry by the lessor is stated, and also that he pulled down part of the summer-house and the benches, so as entirely to deprive the lessee of the use of

of it: and cited 1 *Rol. Abr.* 940. *tit. extinguishment*, letter N. *pl. 1. Cro. El.* 341. the reasoning of which cases he said went to shew, that wherever there is a *tortious* entry by a lessor, so as to deprive the lessee of the enjoyment of the premises, it amounts to a suspension of the rent.

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Lord *Mansfield*. The whole question in this case turns upon the pleading; for the rule of law is clear, namely, that to occasion a suspension of the rent, there must be an eviction or expulsion of the lessee. But here the plea states merely a trespass, and no eviction, therefore the plaintiff must recover.

Asson Justice. I am clearly of the same opinion. The case in *Cro. El.* 341. never received a final determination; and even upon the mootings of it *Fenner* and *Clench* doubted. All the cases in the books suppose the lessee to be put out of possession; therefore merely saying that he was deprived of the enjoyment of the premises is not sufficient, but he must plead that he was evicted. 1 Lord *Raym.* 370. *Clayton* 34. *Hob.* 326. *Reynolds* versus *Buckle*.

Lord *Mansfield*. The defendant certainly should have pleaded *eviction*, and then the facts that are now stated might have been sufficient for the jury to have found a verdict in his favour.

Mr. Justice *Willes* and Mr. Justice *Abbott* were of the same opinion.

Judgment reversed.

DOE ex dim. CHENY versus BATTEN.

Monday,
Feb. 13th.

THIS was an ejectment brought by the plaintiff, against the defendant, to recover some warehouses in *London*. The action was tried before Lord *Mansfield*, at the sittings in last term, at *Guildhall*. At the trial the case appeared to be shortly thus:

The mere acceptance of rent by a landlord, for occupation subsequent to the time when the tenant ought to have quitted according to the notice given him for that purpose, is not of itself a waiver on the part of the landlord of such notice but matter of evidence

The defendant was tenant at will to the lessor of the plaintiff, who, to determine the tenancy, gave notice at *Lady-day* to the defendant to quit at *Michaelmas*. The defendant not quitting at *Michaelmas*, the plaintiff brought this ejectment, and laid the demise on the 30th of *September*: the defendant appeared, and pleaded. Sometime after the plea was put in, the lessor of the plaintiff received of the defendant a quarter's rent, due at *Christmas*. The defendant's counsel insisted that this subsequent acceptance of rent subsequently due, was a waiver of the notice,

ONLY to be left to the jury, under the circumstances of the case.

R 2

and

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and *tantamount* to an agreement, that the defendant should continue tenant. His Lordship said, he took the practice to be so; though in his own opinion it was unreasonable. But being settled, he directed the jury to find for the defendant, which they accordingly did. Afterwards in the same term Lord *Mansfield* said, he had turned the matter in his mind, and likewise mentioned it to the judges, who doubted if the law was as he had directed. It was therefore proper the point should be settled, for which purpose his lordship desired Mr. *Dunning* would move for a new trial. He accordingly did, and now in this term the case was argued by Mr. *Mansfield* and Mr. *Bolton*, for the defendant; and by Mr. *Dunning* and Mr. *Davenport*, for the plaintiff; when the court gave judgment as follows:

Lord *Mansfield*. This case has been extremely well argued on both sides. It was understood on all hands at the trial, that there had been a generally conceived notion and practice, that where a landlord receives rent for the occupation subsequent to the time when the tenant ought to have quitted according to his notice, it is an admission by the landlord, that he was his tenant after that time, and consequently a waiver of the notice. When this was mooted at the trial, I did not think there were any cases against the practice, but looked upon it as established; and therefore I directed the jury to find a verdict for the defendant. At the same time I was strongly of opinion that the practice was unreasonable and derogatory to justice. And now upon examination it does not appear that we are precluded by authority, or any established practice, from judging agreeable to the reason of the case.

It being clearly proved that a quarter's rent accrued since the demise, the question is, Whether sufficient matter appeared in point of law, to prevent the lessor of the plaintiff from recovering in this ejectment? If there did not, the direction I gave was wrong. First, if the matter which appeared ought to have been left as a *fact*, for the consideration of the jury, in that point of view, it was erroneous: And secondly, if it be clear that in law the lessor of the plaintiff was not *barred*, it was still more erroneous. An ejectment is a most beneficial remedy for the recovery of lands. It is a remedy by fiction of law; and therefore should be applied to the purposes that will best answer the ends of justice. In ejectment the plaintiff in his declaration states, that on such a day he had title to the possession of such lands, and upon the trial he is bound to prove that such title was

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in him at the time so specified. The title of the plaintiff in this case accrued by giving six months notice to the defendant to quit; which it was in proof had been duly given: indeed there is no dispute, but that at the time the demise is stated to have been made, the lessor of the plaintiff had a right to the possession; and so he had at the time of the plea pleaded. The single question is, Whether the landlord has, by any subsequent act or agreement, waived such his right, and consented that the tenant should continue the possession? If he has, no doubt but he will be bound by such agreement. As to that, the fact in this case is, that the landlord has received rent *eo nomine* for a quarter of a year, which became due after the time of the demise in the declaration laid. This circumstance, it is insisted, is in fact a declaration on his part, that he departs from the notice he had given; and is an acknowledgment that he still considers the defendant as his tenant. But let us suppose the landlord had accepted this rent under terms, or made an express declaration that he did not mean to waive the notice, and that, notwithstanding his acceptance or receipt of the rent, he should still insist upon the possession. Or suppose any fraud or contrivance on the part of the tenant in paying it. Clearly under such circumstances the plaintiff ought not to be *barred* of his right to recover: But all these are facts which ought to be left to the consideration of the jury.

The question therefore is, *quo animo* the rent was received, and what the real intention of both parties was? If the truth of the case is, that both parties intended the tenancy should continue, there is an end of the plaintiff's title: if not, the landlord is not *barred* of his remedy by ejectment: as where the lessor of the plaintiff, after the time laid in the demise, agreed to accept the single instead of the double rent, which by the *statute 4 Geo. 2. c. 28.* he was entitled to. This very point was determined in a case of *Gilder ex dim. Gilder or Gildoe, versus at Salisbury assizes, 1754.* before the present Lord Chief Baron (then Mr. Baron) *Smythe*. There the single rent had been received by the landlord subsequent to the time of the demise laid; and the objection now insisted on, was made: but Mr. Baron *Smythe* over-ruled it. A case was afterwards reserved for the opinion of *B. R.* when the court held it to be no *bar*; and that it ought not to preclude the plaintiff from recovering in ejectment. Lord Chief Baron *Smythe* and Mr. Justice *Gould* both remember this case. I entirely agree with that opinion. The

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statute gives double rent if the tenant continues in possession after notice to quit. But still it is to be received as rent. What then is the case where a landlord accepts the *single* rent only. The taking *half*, when he is entitled to an action for the whole, is an act of lenity; but it does not import a consent that the tenant shall continue in possession, or a waiver by the landlord, of his remedy by ejectment.

There is another case which was tried at *Launceston* assizes, when Mr. Justice *Gould* was at the bar. The objection taken in that case was, that the lessor of the plaintiff in ejectment, had likewise brought an action for use and occupation of the very same premises, for rent which had accrued subsequent to the time of the demise. This action stood ready for trial at the same assizes. In arguing the objection which is now made, it was said, that the action was an action founded on promises, and a supposed permission by the plaintiff to the defendant to occupy; therefore an acknowledgment on the part of the plaintiff that he was his tenant; and consequently a waiver of his notice. But the objection was over-ruled: and the plaintiff recovered, first in the ejectment, and afterwards in the action for use and occupation. It was holden, that one of the remedies was not a waiver of the other. Why? Because they were brought for several demands, to both of which the plaintiff was entitled; consequently, the one could be no waiver of the other; for after recovery of the possession, the plaintiff was entitled to the profits for use and occupation, if he thought fit to sue for them. Therefore in point of law the mere acceptance of rent is not in itself a bar.

But if there were a doubt whether the possession was by fraud, or in consequence of a new agreement, or whether the acceptance of the rent was mutually intended or understood as a waiver of the notice, that is a fact which ought to be left to the jury to determine. It was not left in this case; and therefore I think there ought to be a new trial.

Asson Justice. There is no doubt but that at the time of the demise laid, the lessor of the plaintiff had a clear right to the possession.

The question is, Whether he has done any subsequent act which amounts to a waiver of that right? The only act which appears is, the acceptance of a single quarter's rent accrued since. I think that is only a waiver of his right to *double* rent under the *stat. 4 Geo. 2.* and does not necessarily imply a consent that

that the tenancy should continue. Where an ejectment has been brought on the *stat. 4. Geo. 2. c. 28. sect. 2.* for the forfeiture of a lease, there being half a year's rent in arrear, and no sufficient distress on the premises; there, acceptance of rent afterwards by the landlord, has, I believe, been held a *waiver* of the *forfeiture* of the *lease*; which may well be; for it is a *penalty*, and by accepting the rent, the party waives the *penalty*. But this case is very different. For here the acceptance of *single* rent, is only a waiver of his right to *double*. Therefore, I am of opinion that a new trial ought to be granted.

WILLES Justice. I am of the same opinion.

ASHHURST Justice. I believe there have been many nonsuits upon this objection. But hitherto the question has not been much agitated: it being rather taken for granted that the practice was so: and, therefore, till now, the matter does not seem to have been sufficiently examined or explained. Whether the acceptance of rent after the time laid in the demise, is or is not a waiver of the notice, depends upon the *intention* of the parties; which is a matter of *fact*, and, therefore, to be left to the jury. If the landlord accepts it only as a compensation for the *double* rent, which the statute says he shall have a right to, it is a waiver of that only: but it does not waive his right to the possession of the premises, which is entirely a distinct and different thing. Therefore I concur in opinion, that the verdict in this case ought to be set aside, and a new trial granted.

*Per Cur.** Let the rule for a new trial be made absolute.

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E A S T E R T E R M

15 GEORGE III. B. R. 1775.

Thursday,
May 4th.REX *versus* VARLO, Mayor of Portsmouth.

UPON shewing cause why an information in nature of *quo warranto* should not be granted against the defendant; to shew by what authority he claimed to exercise the office of mayor of the borough of *Portsmouth*, the constitution of the borough, as far as respected this question, was admitted on both sides to be as follows:—That the corporation was a corporation by prescription, and also by charter of *Car. 1.* and consisted of a mayor, twelve aldermen, and an indefinite number of burgesses; and the mode of electing the mayor, as prescribed by the charter, was as follows: that the mayor, aldermen, and burgesses, *or the greater part of them*, should from time to time have a power of assembling themselves, *or the greater part of them*, at and should there continue till they *or the greater part of them* then there assembled, should chuse one of the aldermen to be mayor.

The election of the defendant was by a majority of the mayor, aldermen, and burgesses assembled; but the mayor, aldermen, and burgesses so assembled, did not constitute a majority of the whole corporation.

The question was, Whether upon the true construction of the words of the charter, a majority of the mayor, aldermen, and burgesses only, who were assembled, or whether a majority of the major part of the whole corporate body, ought to concur in the election of a mayor?

Serjeant

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Serjeant *Davy*, and Mr. *Wallace*, who shewed cause, stated that there were but five instances from the year 1597, to the present time, where a majority of the whole body were assembled at the election of a mayor: consequently if the objection now made should prevail, the corporation must be dissolved. But this is the first time such an objection was ever made in the case of an *indefinite* number of electors, and if good, may affect most of the corporations in the kingdom. The distinction is, that where the election is by the commonalty at large, those who are assembled have a right to elect, though they do not constitute a majority of the whole body; and those who are absent are virtually represented by those who are present. But if the number of electors be *definite*, as in the case of *Rex versus Grimes*, capital burghes of *Yarmouth**, there the majority of the whole body must first meet, and then the major part of those so assembled may elect. And so the court held in that case, but said it would have been different if the number of burghesses had been indefinite, and cited the case of the parishioners of *Wallingford*, cited by *Tanfield*, Chief Baron, in *Lane* 21. reported likewise in 6 *Vin. Abr.* 269 pl. 5.—*The Queen versus Lock*, *Vin. Abr.* same page, pl. 8. where it was held, that if an act is referred to *be done by the commonalty*, there the majority of those who are present will determine and bind the rest.

* Since reported in 5 *Burr.* 2598.

LORD MANSFIELD. If in the space of 170 years there have been but five elections by a majority of the whole body, and such majority is necessary, the corporation must be dissolved, unless the capital burghesses have been in possession of their franchises for 20 years. But even then they are liable to an information filed by the *Attorney General*.

Mr. *Bearcroft*, Serjeant *Glynn*, and Mr. *Davenport*, *contra*, admitted, that where a power is given to any description of persons, such as mayor, aldermen, and burghesses *generally*, to do an act, there it is competent to the major part of those who are present to do such act; but insisted that that was not this case: for here the charter most clearly meant there should be no election of a mayor, but by a majority of the major part of the constituent members, specified and impowered by the charter to elect. The words are, "that the mayor, aldermen and burghesses, or the greater part of them, shall, from time to time, have power, upon such a day to assemble *themselves*, or the greater part of them." Who are to assemble themselves by this direction? At least the greater part of the whole body?

And

1775. And the subsequent direction is, that they shall there continue till they, or the greater part of them, then there assembled, shall chuse one of the aldermen to be mayor, &c. therefore, there must be a majority of the constituent body assembled.

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As to the usage, if the words of the charter were doubtful, the usage under it might be evidence to explain the meaning of them. But here the terms of the charter are clear and express, and, therefore, the corporation must conform to them. As to the consequences that may ensue from the few instances in which the directions of the charter have been pursued; they are no ground for the court to refuse an information; for if the words are clear, justice must be done, though it involve the dissolution of the corporation, and insisted on *Rex versus Grimes* as a case in point.

LORD MANSFIELD. Upon the words of the charter alone, I myself have no doubt about the construction of it. In this corporation there are an indefinite number of freemen; and it is a corporation in which honorary freemen may be made.

It is in the nature of all corporations to do corporate acts; and where the power of doing them is not specially delegated to a particular number, the general mode is, for the members to meet on the charter days, and the major part who are present do the act. But where there is a select body it is a different thing, for there it is a special appointment. All the reasoning therefore is different.

But suppose the words of the charter are doubtful, the usage in this case is of great force; not, that usage can overturn the clear words of a charter: but if they are doubtful, the usage under the charter will tend to explain the meaning of them; especially in a case like this, where, before the charter, the corporation consisted of an indefinite number of burgesses by prescription, and where the charter itself added no new members, but only incorporated the old ones. Since the charter, namely, for these last 170 years, the major part of those only who were assembled, have concurred in electing the mayor; and there are but five instances during that period, in which the members so assembled have constituted a majority of the whole body. My only doubt at present is, whether it ought not to be put upon the record if the parties are desirous to try the question, and to be at the expence; and therefore I think the rule should be made absolute in one, and enlarged as to the rest.

ASTON Justice. In the case of an indefinite number of burgesses, as there are in this corporation, I cannot conceive that the charter meant a majority of that indefinite number should be present.

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The usage anterior to the charter of *Car. 1.* cannot alter the charter, but it will guide the construction in a case where it does not plainly appear that the charter meant to vary such former usage. Therefore I concur with my lord, that the rule should be absolute as to one.

Mr. Justice *Willes* and Mr. Justice *Asbhurst* concurred.

LORD MANSFIELD. The use of a trial will be to find the usage.
Rule absolute in one.

DRINKWATER and another, Assignees of DOWDING, *Friday, May 12th.*
versus GOODWIN.

THIS was an action brought by the plaintiffs, as assignees of the estate of *J. Dowding*, a bankrupt, for a sum of money, for goods sold and delivered to the defendant. Upon the general issue pleaded, a verdict was found for the plaintiffs damages 194 *l.* subject to the opinion of the court, upon the following case.

A factor who becomes surety for his principal, has a lien on the price of the goods, sold by him, for his principal, to the amount or the sum for which he has so become surety.

J. Dowding, the bankrupt, was a clothier, and employed *Edward Jeffries* a factor, who sold to the defendant *Goodwin*, the cloths in question, marked *J. Dowding*, before any act of bankruptcy committed by *J. Dowding*; but did not receive the money for them till after the action was brought. The cloths were sold by *Jeffries*, as factor, and the defendant *Goodwin* knew him to be so, in the usual course of business, and in his own name. The money was paid by *Goodwin* to *Jeffries*, after notice to him from the assignees not to pay it to *Jeffries*.

Edward Jeffries was a creditor of *Dowding*, for several sums of money exclusive of the bonds hereafter mentioned; for which sums he received full satisfaction by the money in his hands, or by cloths in his possession. As to the bonds, *Dowding* borrowed money to the amount of 3,000 *l.* and upwards, and by letter bearing date the 1st of May, 1769, applied to *Jeffries*, his factor, to be security for him jointly in these bonds. The letter was as follows:

“ Sir, I take the liberty of asking you, whether, if I should
“ meet with any sum which the lender may think too large
“ for

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" for my security only, you will favour me with your's jointly
" with my own, upon my engaging, as a means to prevent a
" possibility of danger to you, to send you all the cloths that
" I shall make of such monies, as you may be security for with
" me."

To which *Jeffries* sent the following answer;

" Sir, I am willing to join my name to yours, in the security
" you propose on the plan I now lay down; which is done to
" render a counter-bond unnecessary, and to put me in the same
" state as if I advanced the money myself: this, I am satisfied,
" you will not impute to my want of confidence in you, which
" I have as fully as in any man; but it is pointed out to me by
" the common rules of trade, and answers every purpose as fully
" as can be: the plan I mean is, that the money shall be paid
" into my hands, which you will draw for, as in common
" course, and I will give you a memorandum of having received
" such sum, to be employed solely to your trade, without any
" claim for interest, provided you duly pay it to the obligor."

—When money was taken up on the joint bonds of *Dowding* and *Jeffries*, *Jeffries* acknowledged the receipt of it to *Dowding* in the following form: "I have this day received of *A. B.* " for your use 500*l.* for which I have given your account " credit." Accordingly the money due upon these bonds was stated in the annual accounts sent by *Jeffries* to *Dowding*. No part of the money due upon any of these bonds was paid before the act of bankruptcy; but the whole has since been paid by *Jeffries*, and *Jeffries* has not sufficient from the cloths in his hands, or the money due from the defendant, to satisfy the bonds,

The question was, Whether the assignees were entitled to recover against the defendant?

Mr. Buller for the plaintiffs.—It will be insisted on the other side that the money being raised jointly by the bankrupt and *Jeffries*, must be considered as money really lent by *Jeffries* to the bankrupt; but though the letters affect to import as much, it is not true in point of fact, and, therefore, the transaction was a fraud upon the rest of the creditors, calculated on the one hand to give the bankrupt a false credit, and on the other to give *Jeffries* the factor, a preference. But there was no immediate debt due from the bankrupt to the factor, at the time of the agreement. For the bankrupt was liable in the first instance, and if the bankrupt had paid the money, the factor could
never

never have called upon the bankrupt. 2. There was no debt due to the factor at the time of the action brought; for at that time he had paid no part of the money taken up on the bonds, nor was he ever any money in advance to the bankrupt. On the contrary it is expressly stated in the case, that all the money paid by the factor was paid since the action brought; so that at the commencement of the suit, the factor was no creditor at all. If so, this is no more than the general case, where a sale by a factor is considered as a sale by the owner himself, for which the owner may bring his action: for at the utmost there was but a possibility of a debt due to the factor at the time.

But secondly, it is insisted on the part of the defendant, that the factor has now a lien on the price. Let us examine therefore what a lien is? It is a tie or hold upon goods or other things, which a man has in his *custody*, and which he has a right to retain till he is paid what is due to him; but that can only be where he *has* the *custody* and possession of the thing. He cannot have a right to hold that which he has *not* in his *custody*; for without the custody there is no lien, and so it is expressly laid down in *Chapman versus Derby*, 2 *Vern.* 117. 1 *Atk.* 134. and the cases there cited. But here the factor has parted with the possession, by disposing of the goods to the defendant; therefore he had no lien on them; and as to the price or value of them, that clearly was not in his hands or possession, at the time of the action brought; therefore, there could be no lien on that: and consequently the payment afterwards was fraudulent.

Mr. *Davenport*, *contra*, for the defendant.—It is too clear to be disputed, that every factor has a lien for the general balance of his accounts; and, therefore, *Jeffries* certainly had a lien for such general balance. In this case the points are two. 1st. Whether possession must unite with the lien; and if it must, whether that possession has been parted with in this case? 2d, Whether this transaction is in its nature fraudulent. 1st, The lien in this case has not been parted with. I admit the right of the principal to maintain an action for goods sold by his factor, but then it must be qualified with this restriction; namely that the principal is not indebted to his factor; if he is, he cannot: because, if he could, the factor would have no security in his hands. Now that security is not confined to the actual possession of the goods themselves; for in that situation they are mere lumber: it is the value of them which is the real security, and that value, when the goods are parted with, the factor has a right to

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to retain, and is in law a continuation of the possession. In this case no account was kept between *Goodwin* and the bankrupt; the only account was between *Goodwin* and *Jeffries*. The bankrupt could not have brought an action against *Goodwin*, without the intervention of *Jeffries*. If so, the assignees can be in no better situation than the bankrupt himself would have been in. *Jeffries* is in the same situation as the acceptor of a bill of exchange, who has a right to sell the goods of the drawer, and to reimburse himself with the value. But if selling the goods were such a parting with the possession as would devert the lien which he had before, the mischief and inconvenience to trade would be endless. So here *Jeffries*, having advanced this money upon his own credit, when the goods came to his possession, had a right to sell them, and to retain the value to reimburse himself. The possession, therefore, remained as much as if the goods themselves had remained.

2dly, This mode of dealing was no fraud upon any of the creditors, or upon the assignees. For *Dowding* could not have carried on his trade without money or credit. *Jeffries* not having money, lends him his credit and name, by becoming surety in these bonds; that is to all intents and purposes, the same thing as if he had lent him money; and it was not competent to *Dowding* to sue *Jeffries* for any money he might receive, till *Jeffries* had discharged the amount of the bonds; for till then the balance was against *Jeffries*: therefore, the law and justice of the case is, that the fair balance should now be settled between him and the creditors of the bankrupt. And so it was held, 2 *Chan. Cases*, 36. Suppose a factor were to fail, and his assignees afterwards receive money for goods sold by him as factor; it has been determined in that case, that the principal is not to come in as a creditor under the commission, for the general balance, but shall receive the full value of the goods. For the same reason, the factor in this case is entitled to all the goods in his possession.

Lord MANSFIELD.—I think you state the material fact of the case contrary to the finding. The question you make is, Whether the possession continues? And to judge of that, the transaction should be known. Now the transaction was thus: *Jeffries* sold these goods to the defendant *Goodwin*, in his own name; without any reference to the principal, or without even making the principal creditor for them. But the goods are marked *J. Dowding*; therefore, the defendant must have known he was the

principal, and that was the reason of making that fact part of the case.

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I should be glad to know if there is any authority, where, after a factor had sold goods in the manner here mentioned, it has happened that the principal has forbid the vendee to pay the value to the factor, and the vendee has notwithstanding paid the factor. In this case the whole turns upon the circumstance of the assignees (who stand in the place of the bankrupt) having forbid the defendant to pay *Jeffries*: there can be no doubt, that where a factor, who is fully paid all his demands, becomes bankrupt, the property of all the goods remaining in his hands is in the principal, and he may sue for them in his own name.

Cur. advisare vult.

Afterwards, on *Tuesday* 16th of *May*, Lord *Mansfield*, after stating the case, delivered the opinion of the court, as follows:

It appears from the facts stated in this case, that the defendant *Goodwin* has taken upon himself to pay the money in question to *Jeffries*, after notice from the assignees not to pay it to him, and after, which I take for granted, an indemnity offered by them, and also an indemnity from *Jeffries*. It is, therefore, the case of *Jeffries*; and the question is between *Jeffries* and the assignees, which is entitled to receive this money.

The maxim of law which says, that it shall not be in the power of any man, by his election, to vary the rights of two other contending parties, is a very wise maxim, as well as a very fortunate one, for the parties who are so disputing; because, by giving notice to such person to hold his hand, and offering him an indemnity, he renders himself liable to the true owner, if after such notice he takes upon himself to decide the right. And, therefore, though the purchaser of goods from a factor has a right to pay him the money, and be discharged; yet when the principal and factor has a dispute, the buyer, with notice of such dispute, has no right to prejudice the title of the principal. This case, therefore, is in the nature of a bill of interpleader. The defendant is the stake holder, the assignees and *Jeffries* are contending, and the court is to decide.

Jeffries claims the money, as having a lien on it, and the assignees claim it as standing in the place of the bankrupt.

Jeffries claims it as having a lien. To consider the case therefore first upon the *general question*, we think that a factor who receives cloths, and is authorised to sell them in his own name, but

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but makes the buyer debtor to himself; though he is not answerable for the debts, yet he has a right to receive the money: his receipt is a discharge to the buyer; and he has a right to bring an action against him, to compel the payment; and it would be no defence for the buyer in that action to say, that as between him and the principal he (the buyer) ought to have that money, because the principal is indebted to him in more than that sum; for the principal himself can never say that, but where the factor has nothing due to him. There is no case in law or equity, where a factor having money due to him to the amount of the debt in dispute, was ever prevented from taking money for cloths in his hands.

That being the general rule, let us see whether this case differs at all from it: It certainly does not. On the contrary, it is greatly strengthened in the present case, for there is not the least colour to suggest a fraud. But the principal and factor enter into a special agreement, by which the factor undertakes and actually pledges his credit to raise money, for the benefit of the principal; which money is to be worked up in cloths, and which cloths when so worked up, the principal agrees to send to the factor. The agreement therefore is, that he shall have a lien. For he says, "be security for the money, and I will send you all the cloths."—What is the form in which the transaction is put? The factor knew very well that for a general balance of his accounts he had a lien, but he doubted whether such lien would extend to a case in which he was only surety for his principal, and, therefore, he says, "I am led by the course of the trade, to let the money be a joint-bond, &c."

Therefore, we are all most clearly of opinion, that a factor has a lien on the price of goods in the hands of the buyer: and in this case, though he had not the actual possession of them, yet as he had a power of giving a discharge, or bringing an action, he had a right to retain the money, in consequence of his lien, as much as a mortgagee has by the title deeds of an estate in his hands, though he is not in possession. Therefore, let there be,

Judgment for the defendant:

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DENN ex dim. BALDERSTON *versus* BALDERSTON.

Same day.

IN ejectment it appeared at the trial, that *George Balderston* being seised, of the premises in question, duly made his last will, bearing date the 15th of *April*, 1761, and thereby amongst other things devised as follows: Also, I give to my son *Thomas Balderston*, two hundred pounds, to be paid to him by my executrix, herein after named. Also I give to my wife *Elizabeth Balderston*, and her heirs for ever, all my houses at the east end of *Newborough-Street*, in *Scarborough*. I also give to her, and her heirs for ever, my two tenements in *Longwestgate* and *Cooke-Row*, in *Scarborough*, aforesaid. Also I give to my three sons, *George*, *William*, and *Gillis*, and to their heirs for ever, my house, at the end of the *apple-market*, in *Scarborough*, aforesaid, and my close, in *Falsgrave*, as tenants in common, and not as joint-tenants, when they come at age of 21 years, and the rents and profits of them to be received by my executrix, till that time, and employed for their maintenance, education, and benefit, during their minority, and as any of them come at age, their share of the rents and profits thereof to be received by them. Also I give to my wife, my house at the upper end of *Newborough street*, in *Scarborough* aforesaid, now in my occupation, with all the furniture thereto belonging, during her natural life, a proper part of the accruing profits or rents thereof to be applied for the maintenance and education of my three daughters, *Isabella*, *Elizabeth*, and *Janet*, to whom, and their heirs for ever, I give the same, after the decease of my said wife, as tenants in common, and not as joint-tenants. My will further is, and I do hereby order and direct, that if ANY of my above-named children shall happen to die before they come of age of twenty-one years, and without lawful issue, then their property and share in ANY of the above bequeathed premises shall be equally divided among the REST of my surviving children, share and share alike.

Two of the younger sons died under the age of twenty-one years, without issue. *William*, the surviving younger son, brought this ejectment for their shares. *Thomas* was of the age of 21 years, at the time of making the will. A verdict was given to the plaintiff, "children, share and share alike." The eldest son was of age at the date of the will. Two of the younger sons died under age, and without issue. Per cur. The eldest son and the three daughters are equally entitled with the surviving younger son to the shares of the two deceased brothers.

1775. given for the plaintiff, subject to the opinion of the court, on the following question, viz.

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Whether *William* the surviving younger son is entitled to the whole of the house at the east end of the *apple market*, in *Scarborough*, and the close in *Falsgrave*; or the said *Thomas*, and the daughters, or any of them, are entitled to any shares and parts thereof?

Mr. *Davenport*, for the lessor of the plaintiff. The question in this case is a question of intention, and I contend the testator never meant the different classes into which he had divided the objects of his bounty, should interfere with each other: but that their interests should be wholly distinct. The classes are four. 1st, His eldest son. 2d, His wife. 3d, His three younger sons. 4th, His three daughters. The clause in which he says, "if any, &c. of my above, &c." must be confined to the daughters only; for the words "shall happen to die before the age of 21 years," clearly shew that the testator could not mean to include *Thomas* his eldest son, because he was of age at the time; therefore the words cannot be construed in their literal sense. If so, the question is, whether the court does not see plainly, that the intention of the testator was to keep the classes mentioned, entirely separate; and that if one or more of the younger sons died, the surviving son or sons should take his or their part in exclusion of the daughters; and so if one or more of the daughters died, the surviving daughter or daughters should take her or their share, in exclusion of the younger sons. No other construction can satisfy the words, and therefore the lessor of the plaintiff is clearly entitled.

Mr. *Norton*, *contra*, insisted that the testator certainly meant all his children should be equally benefited by the death of any of them. If the construction contended for, on the part of the lessor of the plaintiff, were to take place, and two of the daughters had died, the surviving daughter would have had a better estate than the eldest son, which never could be the intention of the testator. He cited *Smith* versus *Doran*, in *Scacc.* where the testator devised one fourth part of his property to his eldest son, who was of age at the time; and the other three fourths to his three younger sons, who were all under age; and then added, "but if any of my said children should die before 21, then their respective property shall be divided amongst all my children share and share alike." One of the younger children died, and the court held the elder was equally entitled with his younger brothers. And upon the authority of this

case, which he said was in point, insisted that, *Thomas* the eldest son, and the three daughters, were equally entitled with the surviving younger sons.

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LORD MANSFIELD. There can be but one of two constructions of this will; either that the clause in question relates to the distinct premises devised to the three sons and the three daughters respectively, and so to make the substitution a limitation over, as between the three daughters, of their estate and as between the three sons, of their estate; and the other is to blend them together.

ASTON Justice. In the present case I incline to think the testator did not mean to include his eldest son, because the words are "if any of my children shall happen to die before the age of 21," and the eldest son was of age at the time. As to the other children, if the word "respectively" had been put in, it would have been decisive of his intention to keep the interest of the sons distinct, as between them; and in like manner, the interest of the daughters distinct, as between them. I rather think it was meant to go to them respectively.

WILLES Justice. I think the testator meant to provide for his children as equally as he could, and, therefore, that his eldest son should come in for his share in the event which has happened. His eldest son was of age. His intention seems to have been, that if the younger children came of age they should have an absolute interest. But if they or any of them died under age, or without issue, then that their share should be equally divided amongst the rest of his surviving children. There is no reason why he should be supposed to exclude his eldest son, and, as at present advised, I have no doubt he meant to include him in the event which has happened.

ASHHURST Justice, inclined to think the testator did not mean to exclude his eldest son; but gave no opinion.

Cur. advisare vult.

Afterwards, on *Tuesday* the 16th of *May*, Lord Mansfield, after stating the case, delivered the opinion of the court as follows;

The question turns upon the construction of the clause by which the premises are devised over upon the contingency of any of the children dying before the age of 21 years, and without lawful issue.

One construction contended for at the bar was, that it should be taken *respectively*: that is, as a substitution of the estate devised to the three sons, as between them; and again as a sub-

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stitution of the estate devised to the three daughters, as between them; but that construction cannot be maintained from the words; because the testator expressly joins both the devises together: for he says, "their share in *any* of the above bequeathed premises," so that he manifestly blends them together.

The next doubt upon the construction of this will was, Whether *Thomas* the eldest son was to be included or excluded. Upon the *contingency* that is put in the clause in question, namely, "if any of my above-named children shall happen to die before 21," *Thomas* must be excluded; because he was of age at the time of making the will, therefore, he could not be meant by that part of the clause.

The next doubt upon the construction was, Whether "the rest of my surviving children" should mean those only who might die before 21, or whether it should mean *all* the testator's surviving children. There were circumstances thrown out at the bar, from whence it was inferred, that the testator was providing equally for all his children; but that does not appear upon the case; if it did, it would strengthen the construction which the court inclines to. But the court cannot ground their judgment upon matters not stated in the case. Upon what is stated, after some doubt, we are at last unanimously of opinion, that these words, "the rest of my surviving children," take in *all* the surviving children; and consequently include the eldest son. Therefore *William* the plaintiff, can only recover his share of the premises in question, equally with the other four surviving children, that is, a fifth part only.

Judgment for the plaintiff for a fifth party only.

Thursday,
May 16th.

Common law power to appoint by deed executed in the presence of two witnesses, ill executed by a will.— Otherwise, if the power had been to appoint by any writing or instrument, or

The Earl of DARLINGTON versus PULTENEY.

THIS was a case out of chancery, for the opinion of this court; and the material facts stated were as follow:

Sir *William Pulteney*, by his last will, bearing date the 30th of *April*, 1685, devised certain houses and tenements, in the county of *Middlesex*, to his wife, for life. Remainder to his son *William Pulteney*, for life. Remainder to his grandson *William Pulteney*, son of his said son *William*, afterwards Earl of *Bath*, for life. Remainder to trustees, to support contingent remainders. Remainder to the first and other sons of his said grandson *William* successively in tail male. Remainder to the

second

second and other sons of the said testator's said son *William*, successively in tail-male. Remainder to the said testator's son *John*, for life. Remainder to the said testator's grandson *Daniel*, for life. Remainder to trustees, to support contingent remainders. Remainder to the first and other sons of the said *Daniel*, successively in tail-male; with remainder to the said testator's grandson *Henry*, for life; with remainder to trustees, during his life, to support contingent remainders: with several remainders over. Remainder to the said testator, and the heirs of his body. Remainder to the testator's said sons *William*, *John*, *Charles*, and *Thomas*, successively in tail general. Remainder to *Henry Guy*, Esq; and his heirs for ever.

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Afterwards, the said *William* the grandson, then Earl of *Bath*, being then tenant for life in possession, of the said houses and tenements under his said grandfather's will, and being also entitled under the will of the said *Henry Guy*, to the ultimate remainder in fee, expectant on the said several particular estates limited by the will of his said grandfather: And *William Pulteney*, Esq; commonly called Lord *Pulteney*, the only son of the said Earl of *Bath*, being then of age, and being under the said will of Sir *William Pulteney*, tenant in tail in remainder, of the same houses and tenements, immediately expectant on the decease of his said father; the said Earl of *Bath*, and Lord *Pulteney*, by indenture of bargain and sale bearing date the 2d *January*, 1753, conveyed the same to *Thomas Newton*, to make him tenant to the *præcipe* for the purpose of suffering two recoveries of the said premises, the uses of which it was declared should be, after limiting the same to the Earl of *Bath*, for life, and subject to a jointure of 1,500 *l.* a-year to lady *Bath*, "To the use of such person or persons, and for such estate or estates, and in such manner and upon such trusts, and subject to such provisoes, powers, and agreements, and for such intents and purposes, as the said *William* Earl of *Bath*, and *William* lord viscount *Pulteney*, by any their deed or deeds, (either with or without power of revocation) to be by both of them sealed and delivered in the presence of two or more credible witnesses should from time to time jointly grant, direct, limit, or appoint. And in case of the death of either of them the said *William* Earl of *Bath*, and *William* lord viscount *Pulteney*; then as the survivor of them, by any deed or deeds, to be executed as aforesaid, should from time to time alone grant, direct,

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“ limit, or appoint, and in default of such appointment, to
“ the uses they before stood limited to, by Sir *William Pulteney's*
“ will.”

In *Hilary* term, 1753, the two common recoveries were duly suffered.—On the 12th of *February*, 1763, Lord *Pulteney* died, without having executed or joined with his father in the execution of any deed of appointment of any of the said hereditaments, and without issue.—On the 21st of *May*, 1763, the earl of *Bath* made his will, and thereby gave all his real estate whatsoever and wheresoever, other than and except the piece or parcel of ground, messuage, or tenement, with the erections and buildings therein after mentioned to be in the possession of the earl of *Egremont*, to his brother General *Pulteney*, in fee; and limits the said piece or parcel of ground to his said brother, for life, in strict settlement. This piece of ground was part of the estate late of Sir *William Pulteney*, and passed under the limitations in his will, to the Earl of *Bath*, and is comprized in the indenture of the 2d of *January*, 1753, and the recovery suffered in *Middlesex*, in pursuance thereof.

The Earl of *Bath* died on the 7th of *July*, 1764, without leaving issue. General *Harry Pulteney*, who was second son of *William Pulteney*, the son of Sir *William Pulteney*, survived his brother the Earl of *Bath*, and upon his death became heir of the body of Sir *William Pulteney*, and upon the death of the Earl of *Bath* came into possession of the estates late of the said Sir *William Pulteney*. General *Pulteney* by his will, dated 4th *August* 1767, devised all his messuages, grounds, lands, tenements, hereditaments, and real estate, in the county of *Middlesex*, and also all and every his manors, messuages, lands, tenements and hereditaments, and real estate in the county of *Somerset*, or any county adjacent to the said county of *Somerset*, and in the counties of *Montgomery*, *Salop*, and *York*, to trustees therein named, for 500 years. Remainder to the use of *Frances Pulteney*, for life. Remainder to the first and other sons of the body of the said *Frances Pulteney*, successively in tail male, with the several remainders over, and died on the 26th of *October* 1767, without issue; and upon his decease, the defendant Mrs. *Frances Pulteney*, grand-daughter of *John*, the second son of Sir *William Pulteney*, became heir of the body of the said Sir *William Pulteney*, and as such, became entitled to an estate-tail in such of the said hereditaments as were devised by the will of Sir *William Pulteney*, by virtue of the limitations in that will to Sir *William Pulteney*, and the heirs of his body, if
that

that limitation was then in force. All the preceding limitations under that will being spent and determined, upon the decease of General *Pulteney*, without issue.

The question stated for the opinion of the court was, Whether so much of the estate comprized in the indenture dated the 2d of *January*, 1753, as was taken by the will of Sir *William Pulteney*, deceased, passed by the will of *William* earl of *Bath*, deceased?

Mr. *Kenyon*, for the plaintiffs.—The question is, Whether the will of the Earl of *Bath* is a good appointment, under the power contained in the indenture of 2d *January*, 1753; or in other words, Whether it is for this purpose a deed? I contend it is: And first, it is observable with respect to powers in general, that they were a species of transmutation of property unknown to the common law, prior to the statute of uses, 27 *Hen. 8. c. 10.* At common law the only ancient conveyance of corporeal freeholds, was by livery of seisin: prior to the statute, courts of equity alone entertained questions of this kind; and the mode of construction which they exercised at that time, was the same as they now exercise in the case of trusts. When the statute of uses gave the courts of law a power to judge of uses, it must be supposed the legislature intended they should judge of them by the same rules; for the only reason of giving the cognizance to them, was for the sake of brevity and dispatch. However, in some of the early cases, the courts of law construed powers very rigidly.

Powers are of three kinds.—*First*, Naked powers, unaccompanied with any interest. To this species of powers only, the common law authorities apply; and the construction of them, like the construction of conditions to which they were compared, has been very rigid. *Secondly*, Powers granted to the donee of a particular estate. These powers having their foundation in the will of the donor, were formerly construed strictly in favour of the remainder-man; but no further: and of late even that strictness has been thought wrong; so that now they are taken more liberally. 1 *Peere Williams*, 244. *Beale* versus *Beale*.—2 *Burr.* 1, 136. *Thirdly*, Powers reserved by the donor to himself. These powers have always been taken largely; and of this class is the present power. For though before the recovery was suffered, the earl of *Bath* was not absolute owner of the inheritance, yet after the recovery he became so, and Lord *Pulteney* was in the same situation. The question then will be, Whether

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it was the intention of Lord *Bath* to dispose of this property. That it was his intention is manifest by the devise of *Egremont* house. If so, the only remaining question is, Whether the instrument he has made use of was proper for the purpose? Now though every will is certainly not a deed, yet if a will has all the essentials of a deed, as this will has, it shall be taken to be a deed. *Spelman* in his glossary, title *factum*, and title *testamentum*, defines them both by the common technical name of *charta*. But a strong circumstance to shew that the Earl of *Bath* meant this should be taken as a deed is, that the will is sealed, which is no part or ingredient of a will; but is of the very essence of a deed. Therefore, the substantial part of what the instrument giving the power enjoins has been complied with, which is all that is necessary. The circumstances are but cautions to prevent imposition: and so it is expressly laid down in *Ashton versus Smith*, 1 *Chan. Cases*, 263, 4. Lord *Bath* versus *Montague* 3 *Chan. Cases*, 126. There the deed of revocation by the terms of the power was to be executed by six witnesses, three of whom were to be peers, whereas it was executed by three witnesses only. But Lord *Somers* said, that had the duke in *Jamaica* had an express *deliberate intention* to revoke, and, to testify it, had gone as far in pursuance of the circumstance as his condition in those parts would admit, that is, by having the competent number of witnesses, though none of them were peers, equity might have cured the defect. In *Hob.* 277. it is held that the judges should be *astuti* to assist the intention of parties, rather than work a wrong by enforcing rigid rules. The same doctrine is held in *Sneyd* versus *Sneyd*, in *Canc.* 3d February, 1747. *Kibbet* versus *Lee*, *Hob.* 312. *Tollett* versus *Tollett*, 2 *P. Williams*, 489. and Lord *King's* opinion, in 2 *P. Williams*, 506. These authorities agree, that where the intention of the party to do the act is manifest, the power shall be construed liberally, and the execution of it favourably in support of such intention. Here the intention is manifest by a solemn and deliberate act, which, though not a deed, has all the requisites of a deed; and, therefore, in every material respect is substantially and essentially the same.

Mr. *Dunning* for the defendant. A deed and a will are totally different things. The essence of a deed is sealing and *delivering*, *Co. Litt.* 35. b. As to the intention of the Earl of *Bath* that does not appear so clear, for the devise of *Egremont* house is not of itself a sufficient proof that he meant to dispose of this property. With respect to the power, it is not of the class under

der which it has been ranked; for it is not a power proceeding from any original title or ancient dominion in Lord *Bath*: for at the time of the recovery, Lord *Bath* was only tenant for life, with the reversion in fee. The only object of the recovery was to let in Lady *Bath*'s jointure, and when that purpose was satisfied, Lord *Bath* remained in all other respects tenant for life, in strict settlement.—The power was a power given by his son Lord *Pulteney*, with a view of enabling them to make a family settlement by some joint act, during their lives, or to be exercised in case of the death of either of them, by the survivor.

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The cases cited are not applicable to the present question. *Sneyd* versus *Sneyd*; was a case where children were unprovided for: and *Tollett* versus *Tollett*, 2 *P. Williams*, 489. was the case of a wife under the same circumstances. But Lord *Darlington* is neither wife, child, or creditor. And he relied on the case of *Dormer* versus *Parkhurst*, 2 *P. Williams*, 506. as a case in point.

LORD MANSFIELD.—Under the will of Sir *William Pulteney*, the earl of *Bath*, before he made his will, subject to his own chance of having issue male, and to the chance of his brother and several other persons having issue male, had, as heir of the body of the testator, an estate tail in the premises in question; which, if not docked by a common recovery, would have come to General *Pulteney*, his brother. He could, therefore, by virtue of the will of Sir *William Pulteney*, devise nothing by his own will but his reversion in fee, which after an estate-tail in an adverse claimant, was of no great value. To enable him to devise, it was necessary that he should resort to a common recovery, which however could not be suffered, without the assistance of his son. His son joined in it; and by this recovery, and also by the deed to make a tenant to the præcipe, it is provided, “that subject to the earl of *Bath*'s estate for life, and a jointure of 1,500*l.* a year to Lady *Bath*, the estate should be limited to such person or persons, and upon such trusts as the earl of *Bath* and Lord *Pulteney* by any their deed or deeds, either with or without power of revocation, to be executed under their hands and seals, and signed in the presence of two witnesses, should from time to time grant, direct, limit, and appoint; and in case of the death of either of them, then that the survivor of them, by any deed or deeds executed as aforesaid, should alone grant, direct, limit, or appoint, and in default of such direction, and in the mean time to all the uses of Sir *William Pulteney*'s will.”—After this, the earl of *Bath* makes his will,
and

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and by it he gives every thing to General *Pulteney*, absolutely, except the spot of ground upon which the earl of *Egremont's* house was built, which he gives in *strict settlement*. Now these premises are a part of the estate devised by the will of Sir *William Pulteney*, and one use made of it at the bar is, that Lord *Bath* meant to settle these premises in the particular manner stated: and, therefore, meaning so to do, as against General *Pulteney*, there is a standing condition, namely, that if he will take any part he must not disturb the other devisees. But that is not the question sent to us; and as to the intention of Lord *Bath*, there is no strong intention one way or the other. The question before us is, Whether by the general words of the will, this power so created, is well executed?

Be the value of the estate what it may, it does not alter the difficulty of the question: whether it be worth 10*l.* or 10,000*l.* it is the same thing; if the court has no doubt on a question, it is due to the parties that we should deliver our opinion, without allowing them to litigate the matter further, in a second or third argument.

I have no particle of doubt on this question. It is very difficult to maintain, on any principle of law, reason, or convenience, a distinction between *equitable* and *legal* executions of powers; which were originally, in their nature, equitable, but are by the statute of uses transferred to common law. Mr. *Kenyon* has said very truly, that at common law powers were unknown. They were modifications of trusts, and directions to the trustees, which bound his conscience, and which he was compellable in a court of equity to execute. The statute of uses transferred entirely all that was equitable into a legal modification; and the courts of law were then bound to ask what was the equity; because the statute said, that the law should follow the equity. It has likewise been very truly said, that there were few cases upon the execution of powers before the *stat. 27 H. 8. c. 10.* and none have come down to our time by way of precedents. Powers, therefore, being a new thing, and the courts of law having no equitable precedents in point to guide them, compared them at first to conditions which they are not at all like; and consequently held that they should be construed strictly. They looked upon them in the light of powers vested in a third person over the estate of another man; whereas, in fact, they are only a different species of ownership and enjoyment of property. But a long series of precedents has now settled in the court of chan-

cery,

cery, that in the construction of powers, wherever the power is executed for a *meritorious* consideration, namely, as a provision for a wife or child, or for the benefit of creditors or purchasers, there the precise form prescribed for its execution need not be strictly pursued; and if it is now settled it is settled on principles that existed before.

That being the case, courts of law ought to follow equity; because there should be a general rule of property: and if the courts of equity say, we will presume that where the execution is for a meritorious consideration, a strict adherence to the precise form was not intended, and therefore it is not necessary; the moment the same rule is fixed and adopted at law, every man who creates, and every man who is to exercise a power, understands what he is to do. In the construction of powers *originally* in their nature *legal*, courts of equity must follow the law; be the consideration ever so meritorious: for instance, powers by a tenant in tail, to make leases under the statute, if not executed in the requisite form, no consideration ever so meritorious will avail. So with respect to powers under the civil-list act, powers under particular family entails, as the case of the duke of *Bolton*, &c.; equity can no more relieve from defects in them, than it can from defects in a common recovery. The principle upon which the rule of construction in these cases is founded is, that there is nothing to affect the conscience of the remainder man. Therefore it is difficult upon principles to maintain any distinction between equitable and legal execution of powers. In the case of the Earl of *Bath*, *abroad*, where it was required that the power should be executed by six witnesses, three of which were to be peers of the realm, there being no peers there, if he had got six other people to sign and seal, and conform to the requisites of the power, it might have been good on account of the impossibility of executing it in any other way; but there is no impossibility in the present case.

We come then to the construction of the present power, and to say whether the will of Lord *Bath* is a good execution of it. As to that question, in construing powers, there have, as I said before, been some pretty narrow cases: but I think, as being a species of property, they should be construed liberally. *Kibbett* versus *Lee*, in *Hob.* 312. is a very proper decision.—As to the case of *Dormer* versus *Thurland*, 2 *P. Williams*, 506. it goes a great way. There, a power was given by will, or any writing in nature of a will, sealed and attested by three or more witnesses, to *Baron* and *Feme*, to charge the premises with 2,000*l.* upon the death of either first: the husband died first, and by will

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under his hand, attested by three witnesses, but *not sealed*, charged the premises with 2000*l*. It was there strongly contended that the will was a sufficient execution of the power, being made according to the statute of frauds.

Lord *King* was of opinion, that it was a good execution of the power, because by will; and I own I should incline to that opinion. But it was determined by the judges of *R. B.* that it was not.

There are two cases however, that were lately decided in the House of Lords, which have been construed more liberally. The first is a case of the Earl of *Rosscommon* against *Fowkes*, on the 3d *April*, 1745, on an appeal from *Ireland*. *Fowkes* and his wife made a settlement of the wife's estate, with a power to the wife on contingencies which happened, in these words, "by any *writing* under her hand and seal attested by two credible witnesses, notwithstanding her coverture, and as if she was sole and unmarried; and by the same or any other deed, notwithstanding her coverture, to grant, limit, and appoint, &c." She, by *will* duly executed, without reference to her power, devised her lands within that power, and the question was, "whether the power was well executed by the *will*?" The court of common pleas in *Ireland*, certified to the court of chancery that it was; and so the House of Lords here adjudged it according to the opinion of the judges who attended. Now there were only two witnesses; it was to be "by the same," or "any other deed." It was contended these words did not apply to a will; but they laid hold of the words "any *writing*."

There was another case from *Ireland* last year in the House of Lords, which was determined according to the opinion of the judges who attended*. It was a power to let leases for any time not exceeding 31 years, or three lives to *commence in possession*. The execution of the power was a grant of a lease for 31 years, or three lives, *whichever should last longest*. This, it was contended, was in manifest opposition to the power: because, instead of being a lease for one or other of the terms *expressly* as the power directed, it was a lease for one or other, as chance should direct. But according to the opinion of the judges present, it was a good execution of the power for 31 years; and they rejected the words "three lives." The doctrine of these authorities applies only to cases where there are words to lay hold of. But the difficulty in the present case is, that there are no words to lay hold of. The first requisite which the power prescribes is impossible to be performed by will; which is, that it shall be by *joint deed* of Lord *Bath* and his son. Now there cannot be a *joint will*. It is true the

survivor

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Lessee of
Lord *Net-*
terville, and
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survivor has the same power. But then it is emphatically reserved to be executed by "deed:" Now the word deed in the understanding of law has a technical signification, to which a will is in no respect applicable. If any words had been thrown in, such as writing, instrument, or other term of a general comprehensive meaning, it might have been fair to have taken advantage of it in favour of the intention. But here are no such general words, nor any meritorious consideration. If there were, it might have fallen within the reasoning of *Tollett* versus *Tollett*, 2 *P. Williams*, 489. and all the other cases which say that in the execution of powers for a meritorious consideration, it is not necessary strictly to adhere to the precise form. But those very cases shew, that where there is no meritorious consideration, the intention of the person who creates the power cannot properly be fulfilled, unless the form is strictly pursued. Therefore in this case there does not seem to me a possibility of saying that a will is a deed within the terms of this power; and whatever the consequence may be, as we are very clear in our opinion, the justice of the case requires that we should deliver that opinion *now*, and certify accordingly.—The certificate was in these words:

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"Having considered the above case, and heard counsel on both sides, we are of opinion that the power given by the declaration of the uses of the recovery above-mentioned was not duly executed by the will of the late Earl of Bath: and consequently, that only the reversion in fee of the premises comprised in the said recovery, passed by his said will." May 17, 1775.

PIERCE *versus* BARTRUM.

Same day.

THIS cause came before the court upon a demurrer to a declaration in debt, brought by the plaintiff, as chamberlain of the city of *Exeter*, against the defendant, for slaughtering two oxen within the city of *Exeter*, contrary to a by-law made by the mayor and common council of *Exeter*, under a general power given them by charter, *anno* 3 *Eliz.* to make by-laws. The terms of the by-law were as follow:

That no butcher or other person should within the walls of the said city slaughter any beast, upon pain to forfeit for every bull, ox, cow, or heifer, so slaughtered as aforesaid, the sum of 40 s. and for every other beast so slaughtered as aforesaid, the sum of 20 s. And that no butcher or other person should keep any swine within the walls of the said city, nor any stinking filth, garbage, or annoyance, within his house, curtilage, or backside, upon pain to pay for every time such butcher or other person should so offend, the sum of 5 l.

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The declaration charged the defendant to have had notice of the said by-law : but did not state him to be free of the city of Exeter.

Mr. T. Cowper, in support of the demurrer, objected that this by-law was void ; 1st, as being *in restraint of trade* : and 2dly, because it included persons who were *not free* of the city, without any *custom* shewn to warrant it. The prohibition is against slaughtering any ox, bull, or cow, within the walls of the city of Exeter. This is a common law right, and nothing but a custom can controul it. If there were such a custom the defendant no doubt, if he chose to reside there, would be bound to take notice of it.

But without such a custom he is not, because he has no means of knowing that such a by-law exists.

Serjeant Glynn, *contra*, insisted that this by-law was not in restraint of trade ; if it were, he agreed the objection would hold. But the prohibition in this case was a nuisance at common law, and also by the *stat. 4 H. 7. c. 3.* and instanced similar by-laws in London, against exercising the trade of a butcher in *Cheapside*, and against brewers and tallow-chandlers in close parts of the city. As to the supposed ignorance of the party, he said it was an established rule of law, that whoever comes to reside in any place, is for the time being subject to the local jurisdiction of such place : and, therefore, all the inhabitants within the limits of a corporation, are liable to the laws made by them for the good government of the community, even if not admitted to the freedom of it.

Lord Mansfield. This is a very clear case. The by-law in question is not a *restraint of trade*, but only a regulation of it in this particular city : and it is made in confirmation of the act of parliament which has been mentioned. As to the objection that the defendant was a stranger, what my brother Glynn has said is a complete answer to it ; namely, that he is an inhabitant *pro hac vice*, and consequently is bound by the same regulations as the other members of the corporation are. Therefore I am of opinion the by-law is good, and that the demurrer must be overruled.

Aston Justice. I am entirely of the same opinion. The defendant is subject to the local government of the corporation, though he is not a member of it. As to the by-law itself, it is certainly not a restraint of trade, but a regulation only ; and I

think

think a reasonable one, and therefore it shall bind the inhabitants.

Willer and Asbburft Justices, were of the same opinion.

Demurrer overruled.

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DENN ex dim. WILLIAM BURTON and MICHAEL BURTON versus CATHARINE BURTON.

Friday,
May 19th.

IN ejectment a verdict was found for the plaintiff, subject to the opinion of the court upon a special case, the material facts of which were in substance as follow :

That the testator, *William Burton*, was seised in tail general of an estate called *Owlerton*, in the county of *York*, subject to an estate for life therein to one *Margaret Bamforth* widow, for her jointure, and subject also to an estate for life therein to his wife, for her jointure. He was also seised of an estate for life, in the manor of *Wadsley* in the said county, with remainder to his children, on the body of his said wife to be begotten, for such estates and in such proportions as he should by deed or writing, or by his last will appoint. He was also seised of several other lands and premises. He had by his said wife five sons, *George, John, William, Michael*, and *Robert*, and two daughters. He was likewise possessed of a considerable real and personal estate: and being seised as aforesaid, by his will bearing date 24th *June*, 1761, amongst other things devised as follows :

" I give, devise, limit, direct and appoint unto my second son *John Burton*, his heirs and assigns for ever, all that the manor of *Wadsley*, in the parish of *Ecclesfield*, in the county of *York*, &c. Provided always and upon condition nevertheless, and it is my mind and will, that if it shall so happen that my eldest son *George Bamforth Burton* shall die in the lifetime of my said son *John Burton*, without leaving any issue of his body then living, and by reason thereof the manor of *Owlerton*, in the said parish of *Sheffield*, and other the estate now settled in jointure upon *Margaret Bamforth*, of *Highhouse* aforesaid, widow, of which my said son *George Bamforth Burton* will become seised in possession at the death of the said *Margaret Bamforth*, in case he shall be then living, shall descend and come to him my said son *John Burton*, that then and in that case I give, devise, limit and appoint the said manor of *Wadsley*, with the rights, members, and appurtenances thereof,

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" thereof, and the said capital messuage or manor house, with
 " the out-houses, lands, tenements, and hereditaments, here-
 " in before given, devised, limited, and appointed unto my said
 " son *John Burton*, and his heirs, unto and to the use and
 " behoof of my sons *William Burton* and *Michael Burton*, their
 " heirs and assigns for ever, equally to be divided between
 " them share and share alike, to take as tenants in common, and
 " not as joint-tenants; PROVIDED always and upon this further
 " condition nevertheless, and it is my mind and will, that if it
 " shall so happen that both of them my said sons *George* and
 " *John* shall die in the life-time of my said son *William*, with-
 " out leaving any issue of their or either of their body or bodies
 " then living, and by reason thereof the said manor of *Owl-
 " ton*, and the said estate settled in jointure on the said *Marga-
 " ret Bamforth* as aforesaid, shall descend and come to him my
 " said son *William Burton*, then and in that case I give, devise,
 " limit, and appoint the said manor of *Wadsley*, with the said
 " capital messuage, lands, tenements, and hereditaments, here-
 " in before limited and appointed unto my said son *John*, unto
 " and to the use of my said sons *Michael Burton* and *Robert
 " Burton*, their heirs and assigns for ever, equally to be di-
 " vided between them share and share alike, to take as tenants
 " in common, and not as joint-tenants. PROVIDED further
 " and upon condition nevertheless, and it is my mind and will
 " that if it shall happen that they my said sons *George*, *John*,
 " and *William*, shall all of them happen to die in the life-time
 " of my said son *Michael*, without leaving any issue of their or
 " any of their body or bodies then living, and by reason thereof
 " the said manor of *Owlerton*, and other the said estate settled
 " in jointure on the said *Margaret Bamforth*, shall descend and
 " come to him my said son *Michael*, then and in that case, I
 " give, devise, limit, and appoint the said manor of *Wadsley*,
 " with the manor-house, &c. and all other the messuages,
 " lands, tenements, and hereditaments, herein before limited and
 " appointed to my said son *John*, unto and to the only use and
 " behoof of my said son *Robert Burton*, his heirs and assigns
 " for ever."

That *George Bamforth Burton* died without issue, in *July*
1762, in the life-time of the testator; who died on the *19th* of
May 1764, without altering or revoking his will; whereupon
John, his second son, entered into possession of the manor and
 estate in *Wadsley*, and continued to receive the rents and profits

thereof till his death on the 11th November, 1772: and by his will dated July, 1770, gave all his estate to the defendant *Catharine Burton* his wife, and left issue only one daughter. The question for the opinion of the court was, whether *William Burton* and *Michael Burton*, the lessors of the plaintiff, are entitled to the said manor of *Wadsley*, and the capital messuage and estate called *Wadsley-Hall Farm*, or not?

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Mr. *Davenport* for the plaintiffs, stated the question to be, whether upon the death of *George, William* and *Michael Burton* were entitled to the manor of *Wadsley*, in the life time of *John*; and insisted they were.—The question is a question of intention; and upon the plain construction of the will, it is clear that the testator meant to keep the estate of *Wadsley* and the estate of *Owlerton*, from uniting in any one son, except *Robert* the youngest. If so, it would be a forced construction to say, the words “*descend and come*,” mean an actual “*coming into possession* :” because in that case, if *George* had died on one day, and the jointress the next, the estates would have united in *John*; and then even if *John* had died without issue, the younger brothers never could have taken; because his widow would have been entitled. Therefore, upon the plain construction of the words, and the clear intention of the testator, the plaintiffs are each entitled to a moiety of the manor of *Wadsley*.

Mr. *Tooker, contra*. The question is, Whether the family of *John* shall in any event lose the manor of *Wadsley*, till they get the possession of *Owlerton*: and he insisted they should not. The intention of the testator was to give a permanent provision to *John*, and in the event of his elder brother *George* dying without issue, to make that provision better, by substituting the manor of *Owlerton* for that of *Wadsley*. If so, the construction must be, that the estate at *Owlerton* must come into possession before the devise over of *Wadsley* to the plaintiffs can take place, and consequently till that event happens they are not entitled.

LORD MANSFIELD. Upon the words of the will there are two branches of contingency: 1st, “If it should so happen that *George* should die without issue in the life-time of *John*,” and 2dly, “if by reason thereof the lands in jointure should *descend and come to John*.” But what creates the puzzle and doubt is, that there are two ways in which the expression “*descend and come*,” may be construed. 1st, It may mean a coming into possession in opposition to the outstanding jointure.

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If there were no other way of answering this proviso, it would be very strong in favour of the defendant. But it may likewise mean, if in fact it shall descend and come; which is the case that has happened. To be sure, if at all events the estate in jointure must have come to *John*, there would have been no occasion for inserting this proviso. But it was in the power of *George* to have barred all the remainders if he had lived, and to have prevented the estate from coming to *John* at all. On the other hand, the circumstance of the testator beginning with the second son in his devise of the *Wadsley* estate is material. We will think of it.

Afterwards, on the 28th of *May*, in this same term, Lord *Mansfield* after stating the case, delivered the opinion of the court as follows :

The question is, Whether upon the death of *George*, in the life-time of the widow, *John* has lost the possession of the manor of *Wadsley*?

First, to consider it upon the words of the will, there is expressly a double contingency, upon which the estate of *Wadsley* is given over : For not only *George* was to die without issue, in the life-time of *John*; but the lands in jointure, namely, the estate of *Owlerton*, were to descend and come to him. Now there are two ways by which these lands might have been prevented from coming to *John*. 1st. *George*, if he had survived the testator, might by a fine have barred the estate tail. And 2dly, with the consent of the jointress he might have barred the whole by a common recovery. However in fact the estate at *Owlerton* did descend and come to *John*. But it did so, while the jointress was in possession. Was he then to lose *Wadsley* during her life, and so have nothing at all in the intermediate time? Most certainly that could not be the intention of the testator. His view was plainly this : that the estates of *Wadsley*, and *Owlerton* should not go together; but that whenever the second or any other son should become the elder by the death of his brother, or brothers, and for want of issue on their part, the estate at *Owlerton* should descend to such second or other son, then *Wadsley* was to be a provision for the next brother in succession, according to the directions of his will. But he clearly never meant that such elder son should lose *Wadsley*, till he came into possession of *Owlerton*.

Therefore upon the words of the will, strongly supported by the intention of the testator, we are all clearly of opinion, that the

the contingency upon which the estate of *Wadsley* was to pass from *John* to the plaintiffs, must happen upon the estate at *Owlerton*, coming and descending to *John* in possession.

Judgment for the defendant.

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PEAKE versus OLDHAM in Error.

Same day.

ERROR from the Common Pleas in an action of slander, in which the plaintiff, now the defendant in error, declared that upon a colloquium of and concerning the death of one *Daniel Dolly*, the said *Thomas Peake* said to the said *James Oldham*, "you are a bad man, and I am thoroughly convinced that you are GUILTY, (meaning guilty of the murder of the said *Dolly*), and rather than you should want a HANGMAN, I would be your EXECUTIONER." And being apprized that the said words were actionable, and interrogated how he would prove, what he said, answered, that "he would prove it by Mrs. Harvey." 2. You are a bad man, and I am thoroughly convinced that you are GUILTY (innuendo ut antea) and rather than you should want a HANGMAN I would be your EXECUTIONER. Being interrogated how he could prove the said *James Oldham* guilty of the murder of the said *D. Dolly*, he replied, "I can prove it by Mrs. Harvey." 3. "You are GUILTY," (innuendo ut antea) "and I will prove it." 4. "I am thoroughly convinced that you are GUILTY," (meaning guilty of the death of *Daniel Dolly*), and rather than you should go without a HANGMAN I will HANG you." 5. "You are GUILTY," innuendo (guilty of the murder of the said *Dolly*). By reason whereof, and to clear his character, the said *James Oldham* was obliged to procure, and did procure, an inquest in due form of law to be taken on the body of the said *Daniel Dolly*.

Upon not guilty pleaded, the jury found a general verdict upon all the counts, with 500*l.* damages.

The defendant first moved for a new trial in *C. B.* which was refused; and afterwards in arrest of judgment, which rule was likewise discharged by *Gould* and *Blackstone* Justices. (*Absentib. De Grey* Chief Justice, and *Nares* Justice.)

Mr. *Davenport* for the plaintiff in error, objected to the 4th and 5th counts of the declaration, as containing no sufficient ground of action. 1st, Because the words there laid are not scandalous in themselves. 2dly, Not relatively so, by reference

I am thoroughly convinced that you are guilty (innuendo of the death of D. D.) and rather than you should go without a hangman, I will hang you, actionable.

You are guilty (innuendo of the murder of D. D.) held, after verdict, a sufficient charge of murder, tho' the colloquium were only of the death.

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to any prefatory matter before stated: and consequently not capable of being made so by any *innuendo*.

1st, The words, "*you are guilty*," have no determinate meaning at all, without specifying some act or charge to which they are referable, and, therefore, most clearly not actionable in themselves. 2d. The *colloquium* laid is only a *colloquium* of the death of *D. Dolly*, not of an untimely or violent death, or that he died by the hands of the defendant, and, therefore, cannot by an *innuendo* be extended to a charge of murder. In *Miller versus Buckden*, 2 *Bulstrode* 10, 11. saying of the plaintiff, "you was the cause of the death of *Dowland's* child, and I will swear it on the book," were held not actionable, as being too general. So here, the charge is only general, viz. "*You are guilty*," without naming any crime or offence. If so, such general charge cannot be extended by any *innuendo*. For an *innuendo* is only explanatory of some prefatory matter before expressed. 4 *Rep.* 20 *Yelv.* 21. *S. C. Jenk. Cent.* 302. *case* 72. 4 *Rep.* 17.

3dly, There is no ground of special damage; for it was not compulsory on the plaintiff to have an inquisition; nor could any expence on his part attend it; for the coroner could take nothing. Therefore, the two latter counts being clearly bad, the judgment of the *C. B.* ought to be reversed.

Mr. *Buller* for the defendant, was stopped by Lord *Mansfield*, as being unnecessary to give himself any trouble.

LORD MANSFIELD. It is much to be lamented, that in any sort of action, the mere inattention or slip of counsel who are not always sufficiently attentive upon what count the verdict is taken, should be fatal to the party; contrary to the truth and justice of the case, the opinion of the judge upon the merits who tried the cause, and the meaning of the jury who pronounced the verdict. However in civil cases the rule most certainly is settled, that where a verdict is taken generally and any one count is bad, it vitiates the whole. It has always struck me that the rule would have been much more proper to have said, that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad. In criminal cases the rule is so; and one cannot, therefore, but lament that the reverse is adopted in civil cases; because it is as it were catching justice in a net of form. However this consideration will make the court lean against setting aside a verdict upon such an objection without very good reason, that is, without some apparent manifest defect; more especially in a case like the present, where the

the words have appeared to the jury to be so scandalous as to induce them to give a verdict with 500 *l.* damages, and where that verdict has received the sanction of the court in which the action was brought, by their refusing to grant a new trial upon an application to them for that purpose.

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Let us consider then, the grounds upon which the declaration in the present case is attempted to be impeached. Two of the counts are objected to, *viz.* the 4th and last. In the 4th it is said thus, "I am thoroughly convinced that you are *guilty*;" *innuendo*, that you are guilty of the death of the said *Daniel Dolly*, "and rather than you should go without a hangman, I will hang you." Upon this count it is argued, that there are many innocent ways, by which one man may occasion the death of another; therefore, the words "*guilty of the death*," do not in themselves necessarily import a charge of murder; and consequently, as no particular act is charged which in itself amounts to an imputation of a crime, the words are defectively laid. What? when the defendant tells the plaintiff "he is *guilty of the death of a person*," is not that a charge and imputation of a very foul and heinous kind? Saying that such a one is the cause of another's death, as in the case in 2 *Bulstr.* 10, 11. is very different; because a physician may be the cause of a man's death, and very innocently so; but the word "*guilty*," implies a malicious intent, and can be applied only to something which is universally allowed to be a crime. But the defendant does not rest here: on the contrary, in order to explain his meaning he goes on and says, "and rather than you should be without a hangman, I will hang you." These words plainly shew what species of death the defendant meant, and, therefore, in themselves manifestly import a charge of murder.

The *innuendo* to the words of the next count is, that they mean "*guilty of the murder of Daniel Dolly*," and the jury by their verdict have found the fact; namely, that such was the meaning of the defendant. But that is not all; for the jury find a special damage sustained by the plaintiff in being obliged, in consequence of the charge so made by the defendant, to have an inquest taken on the body of the deceased.

What? After a verdict, shall the court be guessing and inventing a mode, in which it might be barely possible for these words to have been spoken by the defendant, without meaning to charge the plaintiff with being guilty of murder? Certainly not. Where it is clear that words are *defectively* laid,

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a verdict will not cure them. But where, from their general import, they appear to have been spoken with a view to defame a party, the court ought not to be industrious in putting a construction upon them, different from what they bear in the common acceptance and meaning of them.

I am furnished with a case founded in strong sense and reason in support of this opinion; the name of it is *Ward v. Reynolds*, Pas. 12. Ann. B. R. and it is as follows: The defendant said to the plaintiff, "I know you very well; how did your husband die?" The plaintiff answered, "as you may, if it please God." The defendant replied, "no; he died of a wound you gave him." On not guilty, there was a verdict for the plaintiff; and on a motion in arrest of judgment, the court held the words actionable; because, *from the whole frame of them, they were spoken by way of imputation.* And Lord Chief Justice Parker said, "It is very odd, that after a verdict a court of justice should be trying whether there may not be a possible case in which words spoken, by way of scandal, might not be innocently said. Whereas, if that were in truth the case, the defendant might have justified, or the verdict would have been otherwise." So here, if shewn to be innocently spoken, the jury might have found a verdict for the defendant; but they have put a contrary construction upon the words as laid, and upon the last count have found that the defendant meant a charge of murder: Therefore I am of opinion that the judgment of C. B. must be affirmed.

Aston, Willes, and Ashhurst, Justices, of the same opinion.

Judgment affirmed.

Same day.

CHAPMAN ex dem. STAVERTON, versus EMERY.

One, after marriage, makes a settlement of certain premises upon himself for life, remainder to his wife for life, remainder to their issue in tail;

and three years afterwards mortgages the premises to B. who was told there was such settlement. The settlement is a voluntary conveyance within the statute 27 El. c. 4.

IN ejectment, a verdict was found for the plaintiff, subject to the opinion of the court upon the following case:

By indentures of lease and release the 3d and 4th of October, 1769, between *Richard Emery*, and the defendant *Mary* his wife on the one part, and *Deodatus Staverton* of the other part, the said *Richard Emery* made a mortgage in fee of the premises in question to the said *Deodatus Staverton*, for securing the payment of 750 l. by annual instalments, the last of which was to be made on the 4th of October, 1776, with a covenant to levy a fine to the

use

use of the said *Deodatus Staverton*; but no fine was levied, nor were the said indentures of lease and release ever executed by the defendant *Mary*. That *Deodatus Staverton* died January 13th, 1771, leaving the lessor of the plaintiff his heir at law.

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That by indentures of lease and release, 28th and 29th March, 1766, between the said *Richard Emery* and *Mary* his wife of the one part, and *Thomas Plummer* and *Joseph Turner* of the other part; the said *Richard Emery* in consideration of ten shillings, and for divers other good causes and considerations, conveyed the said premises to the said *Thomas Plummer* and *Joseph Turner* in trust for the said *Richard Emery* for life, remainder to his wife for life, remainder to the issue of the said *Richard Emery*, and *Mary* his wife in tail; and in default of issue, remainder to the right heirs of the said *Richard Emery* in fee, which said indentures were executed by all the parties thereto.

It was proved that the above 750*l.* was part of a sum of 1,200*l.* agreed, by the said *Richard Emery*, to be paid to the said *Staverton* for the place of carver to the lord mayor of *London*; and that while the negotiation for the purchase of the said place was carrying on, the said *Deodatus Staverton*, and also the lessor, were advised by *Thomas Gates*, that the said *Deodatus Staverton* ought to be careful in what he was about; for that he the said *Gates* believed that *Richard Emery* had made a settlement of the estate intended to be mortgaged, upon his wife and children; for that *Emery's* wife had told him the estate was settled upon her and her children: that the said *Richard Emery* denied having made such settlement, but the negotiation for the purchase of the said place was stopped twice or thrice on that account.

It was also proved, that the said *Deodatus Staverton*, who was in a declining state of health, had, during the negotiation for the purchase of the said place, frequently declared that he would not sell his said place to any person except the said *Richard Emery*: that as the said *Deodatus Staverton* grew worse and worse in his health, he was glad to take the security as it was, and so the first mentioned indentures were executed.

The question was, Whether, under the circumstances of this case, the lessor of the plaintiff is entitled to recover the premises in question?

Mr. *Whitchurch* for the plaintiff stated the question to be, Whether the lease and release of the 28th and 29th of March, 1766, were not a voluntary conveyance, within the statute 27 *El.*

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c. 4. and, therefore, void as against the mortgagee, under whom the lessor of the plaintiff claimed? He insisted it was; that the statute had always received a liberal construction, and cited 3 Rep. 82, *Twine's case*. Moore, 615. Cro. El. 444. 2 Vef. 1. 2dly. That the notice found made no difference. 5 Rep. 60. b. Cases in Canc. temp. Lord King, 65.

Serjeant Sayer for the defendant *contra*, insisted, that the Stat. 27 Eli. c. 4. related only to purchasers; and that a mortgagee was not a purchaser within the stat. 27 Eli. c. 4. The purchasers there specified are purchasers in *fee-simple, fee-tail, for life or years*, and must be either absolute or conditional purchasers. But a mortgagee can hold the estate only till the debt is paid: therefore not a purchaser within the meaning of the statute. But supposing he was, yet here, the wife did not join, nor was any fine levied. 2dly, The mortgagee in this case had full and sufficient notice, and no pretence or circumstance of fraud appears; on the contrary, the settlement was three years prior to the mortgage; therefore, could not have been made with a view to defeat it. He cited *Townsend v. Windham*, 2 Vez. 10. where Lord Hardwicke said, "If there is a voluntary conveyance of a real estate or chattel interest, by one not indebted at the time; if such voluntary conveyance be for a child, and no particular evidence or badge of fraud to deceive subsequent creditors, it will be good, though the party afterwards become indebted."

LORD MANSFIELD.—I rather doubt Lord Hardwicke's saying that, Where a woman about to marry a second husband, makes a settlement of her estate upon the children by her first husband, such settlement has been held good.

Serjeant Sayer then suggested, that in fact the defendant had in consideration of this settlement given up her interest in 1,470*l.* South-sea annuities for her life. But Mr. Justice Willes who tried the cause, said, there was no evidence of it at the trial.

LORD MANSFIELD.—That would have been a very material part of the case; and if upon inquiry the fact should turn out to be really so, you may move for a new trial. But upon the case, as stated at present, no such fact appears; and there is no doubt but a mortgagee is a purchaser.

*Vide 5 Rep.
60 S P. ad-
judged.
1 Eq. Cas.
Abr. 334.
Tonkins v.
Ennis.

As to the point of notice, it is held that notice makes no difference, because it is of a conveyance made void by the statute*.

Suspend the delivery of the *possea* for a few days, to see if you have any evidence that can couple the wife's giving up her annuity with the settlement made upon her and her children; so

as to shew it was not a mere voluntary settlement, but made upon a sufficient consideration.

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N. B. No such evidence was supplied, nor any further application made to the court afterwards.

CHAPMAN
versus
EMERY.

FELL versus RILEY.

Saturday,
May 30th.

IT was decided in this case, that the rule of *Easter term*, 15 *Car.* 2. which provides, "That no warrant of attorney for confessing a judgment executed by any person in custody, shall be of any force, unless some attorney, for and on behalf of such person in custody, and expressly named by him, be present, to inform him of the nature of such warrant," &c. does not extend to cases where the defendant is in custody upon an execution; but only to cases where he is in custody upon *mesne process*. The court said, the reason of the distinction was this; that where a man is arrested upon *mesne process*, the debt is not liquidated; and, therefore, under duress he may be prevailed upon to confess more than is really due. But upon an execution the debt is liquidated, and, therefore, the only purpose of the defendant giving a warrant of attorney in such case is to procure his liberty. If indeed it could be shewn that a party, even in execution, had been prevailed upon to acknowledge a judgment for more money than was really due, the court would give relief under the circumstances. Because cases of fraud and imposition are exceptions to all rules whatsoever. But in the present case, the court observed there were no such circumstances, and therefore discharged the rule for setting aside the judgment entered up on the warrant of attorney.

Warrant of attorney to confess a judgment by one in custody under an execution is good, though no attorney be present on his behalf at the time of its being executed. *Vide 2 Str.* 1245.

BROWN versus BERKELEY.

Tuesday,
May 23d.

THE plaintiff declared in an action of covenant upon certain articles of agreement for the sum of 20*l.* laid between the plaintiff and the defendant, that the defendant did not, within one month from the date of the agreement, find a man who should carry on foot twenty-four stone weight ten miles within fifteen hours time. To this declaration the defendant demurred.

A foot-race is a game within the Stat. 9. Ann. c. 14.

Mr.

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BROWN
versus
BISSE-
LEY.

Mr. Buller, in support of the demurrer, insisted that this was a wager within the *stat. 9 Ann. c. 14.* and therefore void. For though the *stat. 9 Ann.* does not enumerate the different species of gaming mentioned in the *stat. 16 Car. 2. c. 7.*; yet it plainly has reference to, and includes them all under the general words, "*other game or games.*" Therefore in *Goodburn v. Marley, Str. 1,159.* horse racing was adjudged to be within the *stat. 9 Ann. c. 14.* though not particularly mentioned in it. If so, it must also extend to foot races, for both are expressly named in the *stat. Car. 2.*

The only remaining question then is, Whether this being a race against time, and by one person alone, makes any difference? With respect to which he cited *Lynall v. Longbottom, 2 Wils. 36.* where it was admitted by counsel, that a foot race was within the *stat. 9 Ann. c. 14.* and adjudged by the court, that as one horse starting alone, was a horse race, so one person running alone, was a foot race.

Mr. Davenport, *contra*, contended that, at common law, all games were lawful; and, therefore, if this contract was void, it must be made so by some particular statute. It has never been decided that all wagers, upon every event or contingency whatever, are within the statute of gaming. Wagers depending on play are not within the statute, and cited 1 *Salk. 344. Pope v. St. Leger, Jones v. Randall, supra, 37. Earl of March v. Pigot, 5 Burr. 2,802.*

But it is said, that a foot race is expressly prohibited by *stat. 16 Car. 2.* and that *stat. 9 Ann. c. 14.* clearly has reference to it; and, therefore, though a foot race is not particularly mentioned in this latter statute, it is nevertheless included under the general words, "*other game or games.*" If so, there needed no act of parliament against gaming or wagering policies, where there is no interest, nor against many other games since prohibited. The statute ought expressly to have prohibited this species of contract, and not having done so, it remains, as it would have been at common law, a valid and good contract.

The court took time to consider. Afterwards, on Monday May 29th, Lord Mansfield delivered the opinion of the court as follows:

We took time to see if we could distinguish this case from *Lynall v. Longbottom, 2 Wils. 36.* cited in the argument. We think there is no difference between them; and, therefore, there must be judgment for the defendant.

Judgment for the defendant.

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REX *versus* Dutcheſs of KINGSTON.*Same day.*

MR. *Wallace* had moved * on the part of the defendant, for a *certiorari* to be directed to the juſtices of *oyer and terminer*, at *Hicks's-hall*, to remove into this court an indictment found againſt her, at the ſeſſions there, for *bigamy*; and, upon the motion the court granted the writ.

But now Lord *Mansfield* took notice to Mr. *Wallace*, that the motion was irregular. For a defendant has no right to remove an indictment of felony from *Hicks's-hall*, without the conſent of the proſecutor; and in this caſe there was no conſent, therefore his lordſhip ſaid the writ iſſued *improvidē*, and muſt be ſuperſeded.

* May 18th.
A *certiorari* does not lie to remove an indictment for felony from the general ſeſſions of *oyer and terminer*, at *Hicks's-hall*, without the conſent of the proſecutor.

Mr. *Wallace* ſaid, the only object of removing the indictment was for the purpoſe of her being bailed: but *per* Lord *Mansfield*, the purpoſe for which it was intended, makes no difference.—The next day Mr. *Wallace* moved for a *habeas corpus*, Mr. Juſtice *Aſton* having granted a warrant for her apprehenſion (as had been ſettled amongſt the parties, as the propereſt method to be taken) upon a certificate of the indictment being found.

The warrant and the return to it were read; and then Mr. *Wallace* moved to bail her. He mentioned the ſuit in the ſpiritual court, upon the proceedings there againſt Mr. *Hervey*, for jaſtitation of marriage, and alſo the proceedings in Chancery relating to her marriage; all theſe proceedings were put into court, and entered as read. He obſerved, that ſhe muſt, at all events, be tried by her peers, as Mr. *Hervey* was now become Earl of *Briſtol*.

Mr. *Bearcroft*, for the proſecutor, conſented to her being bailed, as there could be no doubt (he ſaid) of her appearance to answer the indictment.

LORD MANSFIELD.—Though we ſhould undoubtedly have bailed her, it is better to take it as upon the conſent of the proſecutor; and ſhe muſt be bound to appear in the Houſe of Lords when required, to answer to the indictment, as well as to appear in this court. But as there is nothing againſt her in this court, her appearance here may be diſpenſed with for the future upon motion without giving her the trouble of actually appearing here in court any more.

Bail

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Bail was taken accordingly, herself being bound in 4,000*l.* and each of her four bail in 1,000*l.**

Rex
versus
DUTCHESS
of KING-
STON.

ATKINS & UXOR *versus* HILL.

Assumpsit
lies upon a
promise by
an executor
to pay a le-
gacy in con-
sideration
of assis.

IN *assumpsit* the plaintiffs declared against *Charles Hill*, being in the custody, &c. for that, Whereas *James Clarke, &c.* by his last will, &c. did give and bequeath to the plaintiff's wife, the sum of 60*l.* &c. and of his last will and testament, made the said *Charles Hill* sole executor, &c. and the said *Charles Hill* took upon himself the burthen and execution of the said will. And the said *N. and A.* further say, that divers goods and chattels, &c. afterwards, &c. came to the hands of the said *Charles Hill*, as executor of the said *J. C.* which said goods and chattels were more than sufficient to satisfy and pay all the just debts and legacies of the said *J. C.* &c. of which the said *C. H.* then and there had notice. By reason of which said premises, the said *Charles Hill* became liable to pay to the said *N. and A.* the said sum of 60*l.* and being so liable, he the said *C.* in consideration thereof, afterwards, &c. undertook and faithfully promised to pay to them the said sum of 60*l.* whenever, &c.

To this declaration the defendant demurred generally.

Mr. Le Blanc in support of the demurrer, objected, 1st, That the declaration was bad upon a general ground; namely, *that no action on the case lies for a legacy issuing out of personality.* Legacies

* The recognizance was as follows.—*England.* Dutcheſs Dowager of *Kingſton*, who ſtands indicted by the name of *Elizabeth*, the wife of *Auguſtus John Hervey*, Eſq; is delivered to bail, upon a writ of *habeas corpus ad ſubjiciendum*, for her appearance in the court of our ſovereign lord the king, before the king himſelf at *Weſtminſter*, on the firſt day of the next term, and ſo from day to day, until ſhe ſhall be diſcharged by the ſaid court, and not to depart the ſaid court without leave; and alſo for her appearance before our ſaid lord the king in parliament, to anſwer to an indictment againſt her for felony, whenever ſhe ſhall be thereunto required.

By the Court. BURROW.

I have inſerted this recognizance, *verbatim*, becauſe there was found only a ſingle inſtance of the like, (*viz.* of a recognizance taken in this court to appear in parliament) which was that of the Earl of *Orrery*, taken and acknowledged before Lord Chief Juſtice *Pratt*, on the 14th *March*, 9 *Geo. 1.* for his appearance in the court of our lord the king, before the king himſelf at *Weſtminſter*, on the firſt day of next term, and ſo from day to day until he ſhall be diſcharged by the ſaid court. and not to depart that court without leave, to anſwer to thoſe things which, on the behalf of our ſaid lord the king ſhall be objected againſt him; and alſo for his appearance from time to time, until he the ſaid *Charles Lord Orrery* ſhall be diſcharged by due courſe of law, before our lord the king in parliament, whenever by our ſaid lord the king he ſhall be thereunto required, to anſwer to thoſe things, which on behalf of our ſaid lord the king ſhall be there objected againſt him.

are

are cognizable only in the *spiritual courts*, which have a peculiar and *exclusive* jurisdiction of testamentary matters. This is expressly laid down in the case of *Nicholson v. Shearman*. Sir Thomas Raym. 23. Sid. 45. S. C. It is true, that in the report of this case by Sid. Twifden justice is made to say, "That in his time" it had been adjudged, that an action on the case lay for a legacy payable out of land." This doctrine of the exclusive jurisdiction of the ecclesiastical courts in cases of legacies, is further established in *Dyer* 264. pl. 41. 11 Mod. 145. Archbishop of Canterbury v. Willett. 1 Salk. 315. S. C. Moore 917. Lloyd v. Madox.

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But further, this court will not hold plea in any case where it cannot do substantial justice between the parties. Now it is a settled rule, upon a suit instituted in the spiritual court, against an executor for a legacy; that the legatee shall give security to refund, in case of subsequent debts; or a prohibition will lie. *Knight versus Clarke*, cited in 1 Vern. 93, 4. And if an executor were to pay without such security, it would be a *devastavit*. Therefore, if an action could be maintained in this court, he must at all events, in case of future debts, be liable *de bonis propriis*, which would be the greatest injustice: for he has no possible means here of compelling such security, nor can the court oblige the legatee to refund.

Objection 2. Before a legatee can entitle himself to a remedy against the executor, it must be shewn that he has received assets sufficient to answer all demands of a higher nature. In this case the declaration only avers, that more is come to the defendant's hands than is sufficient to pay the testator's debts and legacies. But *funeral expences* are to be first paid, about which the declaration is totally silent. Therefore, for want of a sufficient averment, as to this point, the declaration is also bad, and judgment ought to go for the defendant.

Mr. Buller *contra*, for the plaintiff. Not a single common law case has been adduced to shew that this action will not lie: nor has any sufficient reason been assigned, why the temporal courts should not take cognizance of legacies, as well as the ecclesiastical courts. The only reason attempted to be given in any of the books, is a *dictum* in *Perkins. sec. 486.* namely, "That" it is to be intended spiritual men, have better consciencies than "laymen," &c. But this is clearly founded on the superstition of the times. On the other hand, the opinion of Twifden justice, in *Nicholson v. Shearman*, 1 Sid. 46. goes strongly to shew, that the common law courts did originally hold plea in cases of legacy.

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legacy. He expressly says, "Testamentary causes did not originally belong to the spiritual courts, but to the temporal courts and common law; and were proved before lords of manors, as they still are in some places. And there are many precedents in the books, especially in the old books of entries, where actions on the case, and actions of debt, were brought for legacies in the hundred court." He is supported in this opinion by 9 Co. 37. b. 2 Roll. Abr. 217. Year-book. Hil. 11. H. 7. 12. B. Indeed, in *Nicholson v. Shearman*, the other judges agreed, that during the time of the troubles, the temporal courts alone had cognizance of legatary matters. It is clear, therefore, from all these authorities, that the common law courts once had jurisdiction. If so, such jurisdiction could only be taken away by an act of parliament expressly for the purpose. For it is a general principle, that wherever an action could be maintained at common law, it still remains, unless expressly taken away by statute. But no such statute exists; and the weight of authorities is the other way. As to the case of *Nicholson v. Shearman*, the ground of that determination was, not that an action at common law would not lie, but that there it was a *trust*, and the breach of it a *tort*, which dies with the person. The authorities in favour of the action are, *Rastall's Entries*, 301. a. and b. "Declaration in debt against executors by a legatee of the third part of the testator's goods, where the quantum had been ascertained by the ordinary." *Style* 55. where it is expressly said, "an action will lie for a legacy." 2 Lev. 3. *Davis v. Rayner*, which was *assumpsit* in consideration of "forbearance of a legacy," and held good, though *no assets*. *A fortiori*, an action could have been maintained for the legacy itself; otherwise forbearance would have been no consideration. *Sid.* 21. *Butler v. Butler*.

The next question is, Whether the facts stated in this declaration, namely, that the defendant was executrix, and had *assets*, &c. are a sufficient consideration for a promise. As to that question, it is a settled point, that wherever an express promise is made upon good consideration, an action lies: And the slightest ground is sufficient to maintain a promise. 1 Vent. 40, 41. *Wells v. Wells*, 1 Lev. 273. S. C. *Stone v. Withipool*. *Latch.* 21. in which latter case it is laid down, "That it is an usual allegation for a rule, that any thing which is a ground for equity is a sufficient consideration."

But

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But here an express promise is made, and by the demurrer admitted. It is objected, however, that there is no averment that the funeral expences are paid. The answer is, it is averred that he *had assets to pay*, which is alone sufficient, and so it was expressly held by Lord King, in the case of *Camden v. Turner*, Sittings after Tr. 5 Geo. I. C. B. Select cases of evidence by Sir John Strange.

LORD MANSFIELD.—The argument in support of this demurrer, has proceeded upon supposing a *general* question, which is not at all involved in this case; and agitating that general question, as if this were a declaration upon the ground of the will only, and nothing else. If it were a general question, I should not immediately give my opinion. The objection, however, that is taken upon the supposition of its being so, is, that a legacy, arising out of a will of personal estate, being a testamentary matter, the cognizance of it belongs peculiarly and *exclusively* to the ecclesiastical court; and consequently, that the courts of common law have no jurisdiction. If that proposition were true, the objection would hold equally against the jurisdiction of the courts of equity. For it is plain, that where the cognizance of any matter is the peculiar province of a particular *forum*, all other courts are excluded. For instance, a court of equity can no more try the validity of a will of personal estate, or the validity of a marriage, than this court. The judge of the admiralty has cognizance of the question of prize. A court of equity is as much excluded as a court of law; and many other instances might be put.

It is objected, that this court cannot compel a legatee to refund, if debts should appear. In that case, he would be liable to refund, whether he gave security or not. For it would be the case of payment upon a mistaken ground. But if justice required it, this court would make the plaintiff's giving an indemnity, a condition of his recovering. There are many cases where this court has made parties give indemnity.

It is true, that the law concerning legacies was made in the ecclesiastical court. The authority of the Roman law was received. The opinions of doctors and foreign authors upon the civil law, were quoted and respected.

When the courts of equity held plea of legacies, as *incident to discovery and account*, they adopted the whole system by which legacies were governed in the ecclesiastical court. In like manner the courts of law, in the exercise of a concurrent jurisdiction, would adopt the same rules.

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But a legatee who sues at law, must clearly prove that the defendant has received assets, which cannot be done, except in a case so clear as not to admit of litigation. In this respect, the discovery and account given in a court of equity is so preferable a remedy, that it has drawn all such suitors thither: and therefore, in fact, there is scarce an instance of a legatee attempting to sue at law. In clear cases the legacies are paid; in doubtful, the relief given by a court of equity, is easier and better. But upon principles, if the question is constitutionally appropriated to the ecclesiastical jurisdiction, it must equally exclude the courts of equity as well as law. I have mentioned thus much by way of observation upon the objection that has been made, as supposing this a case within the general question; which, however, as I said before, it is not.

This is a case in which the declaration particularly states, that assets have been received by the defendant, the executor, more than sufficient to pay all the testator's debts and legacies. If so, it most undoubtedly must be taken upon the pleadings, that there was sufficient to discharge the funeral expences, because they are payable first; consequently, if there was less than the amount of them, there could not be sufficient to discharge the debts and legacies. The declaration then goes on to state, that in consideration of there being full sufficient assets as aforesaid, the defendant undertook and promised to pay the plaintiff his legacy. No doubt then, but at any time after an executor has assented, the property vests; and if it be a pecuniary legacy, an action at law will lie for the recovery of it. Formerly, upon a bill being filed in Chancery against an executor, one part of the prayer of it was, that he should assent to the bequest in his testator's will. If he had assets, he was bound to assent: And when he had assented, the legacy became a demand which in law and conscience he was liable to pay. But in the present case there is not only an assent to the legacy, but an actual promise and undertaking to pay it: and that promise founded on a good consideration in law; as appears from the cases cited by Mr. Buller, particularly the case of *Camden v. Turner*,* where acknowledgment by an executor, "that he had enough to pay," was held a sufficient ground to support an *assumpsit*. Here the defendant by his demurrer admits he had sufficient to pay: therefore, this is not the case that Mr. Le Blanc has been arguing upon; but it is the case of a promise made upon a good and valuable consideration, which in all cases is a sufficient ground to support an action. It is so in cases of obligations, which

* Sittings
after Trinity
term.
5 Geo. 1.
C. B. coram
King. C. J.

which would otherwise only bind a man's conscience, and which, without such promise, he could not be compelled to pay. For instance, where an infant contracts debts during his minority; if after he comes of age he consents to pay them, an action lies: So a conveyance executed by an infant, which he was compellable to do by equity, is a good conveyance at law. *Co. Lit. Attornment.* 315. a. In this case the promise is grounded upon a reasonable and conscientious consideration; namely, that the defendant had assets to discharge the legacy. If so, he was compellable in a court of equity, or in the ecclesiastical court, to pay it. I give my opinion upon this case as it stands; that is, that it is an express promise made upon a good and sufficient consideration. *Vide* the next case.

The three other judges concurred.

Per Cur. Judgment for the plaintiff.

Mr. *Le Blanc* then moved for liberty to withdraw the demurrer, and plead the general issue, but the court refused it.

HAWKES & UXOR *versus* SAUNDERS *.

Hilary term,
22 Geo. 3.

THIS action was brought against the defendant in her own right; and the declaration stated, that *George Saunders*, by his will bequeathed a legacy of 50 *l.* to the plaintiff; that he appointed the defendant his executrix; that she proved the will; that goods and chattels came to her hands more than sufficient to pay all the testator's debts and legacies, by reason whereof she became liable to pay the legacy, and being so liable, in consideration thereof she promised to pay it.

Monday,
Jan. 22. h.
1782.

Assumpsit lies against an executrix for a legacy, upon a promise in consideration of assets.

LORD MANSFIELD. This case does not at all involve in it the question, whether a legatee has a general right to sue for a legacy in this court.

Two objections have been made; 1st, That there can be no judgment in this case *de bonis testatoris*; because the action is not brought against the defendant as executrix *eo nomine*; but is a personal demand against her generally in her own right. As to that, we are of opinion the objection is good; for the demand is certainly a personal demand against the defendant, in consequence of a promise made by her, she being executrix.

But, if the action be brought against her personally in her own right; the judgment can only be *de bonis propriis*.

It is admitted at the bar, that *after verdict*, it must be taken to have been a promise in writing, and that there were assets. If

* I have inserted this case out of the order of time, for the purpose of bringing the general doctrine upon the same subject under one point of view.

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so, the whole case is reduced to this single point: Whether the circumstance of the defendant having assets sufficient to pay all the debts and legacies, is, or is not a sufficient consideration for her to make a promise to pay the legacy in question? As to that point, the rule laid down at the bar, as to what is or is not a good consideration in law, goes upon a very narrow ground indeed; namely, that to make a consideration to support an *assumpsit*, there must be either an immediate benefit to the party promising, or a loss to the person to whom the promise was made. I cannot agree to that being the only ground of consideration sufficient to raise an *assumpsit*.

Where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made. *A fortiori*, a legal or equitable duty is a sufficient consideration for an actual promise. Where a man is under a moral obligation, which no court of law or equity can enforce, and *promises*, the honesty and rectitude of the thing is a consideration. As if a man promise to pay a just debt, the recovery of which is barred by the statute of limitations: Or if a man, after he comes of age, promises to pay a meritorious debt contracted during his minority, but not for necessities; or if a bankrupt, in affluent circumstances after his certificate, promises to pay the whole of his debts; or if a man promise to perform a secret trust, or a trust void for want of writing, by the statute of frauds.

In such and many other instances, though the promise gives a compulsory remedy, where there was none before either in law or equity; yet as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright mind are a sufficient consideration. But an executor who has received assets, is under every kind of obligation to pay a legacy. He receives the money by virtue of an office which he swears to execute duly. He receives the money as a trust or deposit, to the use of the legatee. He ought to assent if he has assets. He has no discretion or election. He retains what belongs to the legatee, and therefore, owes him to the amount.

An account of assets, or a judgment to pay out of assets, is only necessary when the sufficiency of assets is uncertain. Where the sufficiency of assets received is certain, the executor's duty to pay a legatee, follows by necessary consequence.

The legacy, in such a case, is a demand clearly due from the executor upon various grounds of natural and civil justice, and may

may be recovered from him by process of law. In such a case a promise to pay stands upon the strongest consideration.

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DERS.

Let us see then what the facts are in the present case. The executrix knows the state of her testator's affairs, and of his property. It might consist of chattels which she might not chuse to dispose of. It might consist of leases which she had no mind to sell; and having a *full fund* to pay the demand, which the plaintiff had a right to recover if he pleased, she, in *consideration of that fund*, promises to pay. I cannot think that this is *not* a sufficient consideration. I am of opinion it is amply sufficient. It is not like the case of *Rann versus Hughes*; for there, there were no assets, nor any averment of assets stated in the declaration. But in this case there was a full fund; and therefore she was bound in law, justice, and conscience, to pay the plaintiff his legacy.

Mr. Justice *Willes*, and Mr. Justice *Ashurst* were of the same opinion.

BULLER justice. I am entirely of the same opinion. That an action in the courts of *Westminster-hall*, will, under *some circumstances*, lie for a legacy, is a question which I think can never admit of any serious doubt: For there are a number of cases in the books, from the time of *Henry VI.* to the present time, which prove, that under different circumstances, such action may be maintained. I think there is as little doubt, but that the circumstances of the present case, as proved at the trial, were sufficient to sustain an action; for the legacy was to be paid out of land; and there was an *express assent* by the executrix to the legacy. But the evidence which was given at the trial, is not now before the court: We are to decide this case upon the face of the record alone.

The plaintiff in his declaration has not stated that the legacy was payable out of land; neither has he stated any assent by the executrix.

The action is brought against the defendant in *her own right*; and the declaration is simply, that *George Saunders*, by his will bequeathed a legacy to the plaintiff, and made the defendant executrix: That she proved the will, and had *assets* sufficient to pay all the debts and legacies; and by reason thereof she became liable to pay the legacy, and being so liable, she promised to pay it.

To this declaration, two objections have been made in arrest of judgment. 1st, That the defendant is not sufficiently de-

scribed

1775. scribed as executrix, and, therefore, there cannot be judgment *de bonis testatoris*. 2dly, No judgment can be entered *de bonis propriis*; because there was no consideration for the promise; and therefore it is *nudum pactum*.

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As to the first, I am of opinion, that the plaintiff cannot upon this declaration take judgment *de bonis testatoris*. The action is brought against the defendant in her own right, and not as executrix. It charges her with a *personal* promise to pay the legacy, and not upon a *qualified* promise to pay as executrix, or out of assets. And the plaintiff having by his declaration made a *personal* demand against her; he must stand or fall by that, and cannot now resort to any demand that he may have upon her in the particular character of the executrix.

The forms of pleading are very different where a person is charged as executrix, and where she is charged personally. In the first case, she is always named as executrix in the beginning of the declaration: She is afterwards stated to be liable as executrix; and the promise alleged to have been made by her as executrix. But in the other case, she is charged generally as any other person, and a *general* charge is a *personal* charge.

This case, therefore, depends wholly upon the second question; whether there be a sufficient consideration alleged for the promise; or whether the defendant's promise be merely *nudum pactum* and void.

The consideration stated for the promise is, that the defendant was executrix, and that she had received assets more than sufficient to pay all the debts and legacies. The question is, Whether that be not a sufficient consideration?

Under those circumstances, if there had been *no promise*, nor even an *assent* to the legacy the defendant might have been *compelled* in a court of equity, or in the ecclesiastical court, to have paid it. Whether *without assent* she could be compelled in a court of law, to pay it or not, is a question which it is not necessary to give any opinion upon now; and, therefore, though I have endeavoured to trace out the jurisdiction and the authority of the ecclesiastical court from the earliest times, and though there is great reason to suppose that the jurisdiction which that court now possesses in matters of legacy, was originally got by usurpation on the temporal courts; and though there is a wide difference between allowing to the ecclesiastical court a jurisdiction in such matters, and saying it shall have that jurisdiction exclusive of all other courts; I purposely avoid giving any opinion, or even hinting

hinting what would be the result of my researches where there is no promise or assent.

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I shall give my opinion singly on this point ; Whether an obligation in justice, equity, and conscience, to pay a sum of money, be, or be not, a sufficient consideration in point of law, to support a promise to pay that sum ?

If such a question were stripped of all authorities, it would be resolved by inquiring whether *law* were a *rule of justice*, or whether it were something that acts in direct contradiction to justice, conscience, and equity. But the matter has been repeatedly decided.

In *Stone versus Withypool*, *Latch.* 21. the court say, " It is an usual allegation for a rule, that *every* thing which is a ground for equity, is a sufficient consideration." So in *Wells versus Wells.* 1 *Vent.* 41. the court *presumed* an equitable right in the plaintiff, which did not appear on the declaration ; and held, that to debar herself of that, was a good consideration.

These authorities alone are sufficient to shew, that the ground taken in the argument at the bar is not large enough.

But to come closer to the consideration now in question, in *Camden versus Turner.* C. B. Sittings after *Trin.* 5 *Geo.* 1. King C. J. held, that an action for money had and received, lay against an executor for a legacy, which he had owned lay ready for the plaintiff, whenever he would call for it. In that case, according to the form of the declaration, the objection did not appear upon the record ; but it was necessary for the plaintiff to prove a consideration at the trial ; and if he had not, he must have been nonsuited or have had a verdict against him. But Lord King held, that his owning the money lay ready, was an assent, and admission of assets, and a sufficient consideration.

In *Keech versus Kennegal*, 1 *Vez.* 125. Lord Hardwicke expressly holds, that assets coming to an executor's hands, is a sufficient consideration to support a promise ; and he puts that case upon the same footing as a promise in consideration of forbearance. His lordship says, " at law, if an executor promises to pay a debt of his testator's, a consideration must be alleged, as of assets come to his hands, or of forbearance ; or if admission of assets is implied by the promise ; otherwise it will be but *nudum pactum*, and not personally binding on the executor."

In *Trevinian versus Howel*, *Cro. Eliz.* 91. it was adjudged, that having assets, is a good consideration for a promise, and the judgment, which was *de bonis propriis*, was affirmed : And two other cases are there cited where the same point had been so determined.

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Lastly, The case of *Atkins versus Hill*, *Easter*, 15 *Geo. 3. supra*, 284. is in point. The declaration was the same, and the objection the same as in the present case ; and the court unanimously held that the promise was good, and that the action well lay.

I agree with my lord, that the rule laid down at the bar, as to what is or is not a good consideration, is much too narrow. The true rule is, that wherever a defendant is under a moral obligation, or is liable in conscience and equity to pay, that is a sufficient consideration. Some of the cases which I have mentioned, go fully to that extent. But even if the narrow rule which has been mentioned were adopted, as the true rule, yet in this case, I think the consideration is sufficient ; for here is both a loss to the plaintiff, and a benefit to the defendant, arising from that which is the consideration of the promise. The loss to the plaintiff is, that the effects which are liable to the payment of the legacy have not been so applied : but the defendant has detained them in her own hands for other purposes. The benefit to the defendant is, that she has received those effects, and has them still. The defendant is bound in conscience, to apply the effects towards the discharge of the debts and legacies : She is a trustee for that purpose ; and is guilty of a breach of trust in not so doing : And it is admitted that a breach of trust is a good ground for action.

Therefore I agree in opinion with the rest of the court, that this rule in arrest of judgment, ought to be discharged.

Per cur. Rule discharged.

Saturday,
May 27th.

VALE *versus* BAYLE.

Where a vendee of goods orders a particular mode of conveyance, he must stand to the loss, if any happen.

UPON a rule to shew cause why the *non suit* in this case should not be set aside, and a new trial granted ; *Ashhurst* justice read the report as follows : This was an action for goods sold and delivered : At the trial, a letter from the defendant to the plaintiff was produced, containing a commission to the plaintiff for the goods in question, after which was added the following postscript ; " Pray be expeditious in sending them ; and instead of letting them go by way of *Bristol*, where many things you have sent me have been detained, send them by " *land carriage*." The witness proved the delivery of the goods to the book-keeper of the *Birmingham* carrier, to be sent from thence, by way of *Coventry*, to the defendant, who lived at *Car-*
marthen

marthen. It appeared that there was *no other mode of conveyance by land carriage*, and the goods were lost on the road. Upon this evidence it was insisted, that the delivery of the goods to the carrier, was a delivery to the defendant; but the judge who tried the cause being of a different opinion directed a *nonsuit*.

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Mr. Buller shewed cause. The question is, Whether, under the circumstances of this case, the delivery of the goods to the *Birmingham* carrier, was, or was not, a delivery of the goods to the defendant himself. I insist it was not; for as the letter relative to the mode of conveyance, did not contain any directions to the plaintiff, to send the goods by any particular person, but only an order to convey them by *land carriage generally*; the carrier to whom the plaintiff thought fit to deliver them, must be considered as the *servant* of the plaintiff, and not as the *servant* of the defendant; consequently the plaintiff was answerable for his negligence. If this were a delivery to the defendant, the plaintiff could in no event have countermanded the goods. But suppose, before actual possession of them by the defendant, he had become bankrupt; no doubt but the plaintiff might in that case have stopped them *in transitu*: and would not have been obliged to come in as a creditor only under the commission. This was expressly settled in the case of *Birkett* and others assignees *versus Jenkins, Pasch. 11 Geo. 3. B. R.* The court in that case held generally, that whenever goods delivered to the order of the vendee, are only *in transitu*, the vendor, in case of a failure, may get them back any how he can. Here the goods, at the time they were lost, were only *in transitu*; and, therefore, if a failure had happened, might have been taken back by the plaintiff; consequently, till actual delivery, they were his goods and his property, and not the property of the defendant.

Mr. Green in support of the rule. Wherever a person gives another a lawful authority to do an act for him, the person who gives the order, is answerable for all the consequences that may attend the execution of it. By the written order, in this case, it is plain there had been former dealings between the plaintiff and defendant; and that a particular mode of conveyance had been made use of; namely, by way of *Bristol*: But on account of the goods having been frequently detained, the defendant complains of that mode of conveyance, and at the same time desires the parcel in question, may be sent by *land carriage*. Now it is admitted, that if a vendee names a *particular* carrier, delivery to that particular carrier, vests the property in the vendee; because

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made in pursuance of his order. Here the defendant expressly directs the goods to be sent by land carriage; and it is in proof, that there was no other mode of land carriage, than that which the plaintiff adopted. If so, this is a particular order on the part of the defendant, and the delivery in consequence of it vested the property in him. And so it would have been, even if there had been more carriers than one, as appears from a case cited in 3 *P. Wm.* 186. where it was held by Lord Chief Justice *Eyre*, "That though a trader in the country does not appoint a carrier yet if the goods be embezzled, he shall be liable, because he leaves it in the breast of the person to whom he gives the order, to send them by whom he pleases." Therefore the plaintiff is entitled, and a new trial ought to be granted.

LORD MANSFIELD. I have a difficulty to find a question in this case; for it resolves itself into this short point; *viz.* Whether, in a dispute between vendor and vendee, the vendor is excused from delivering goods according to the order of the vendee?

His Lordship, after stating the case, said, the material part of the letter is as follows; "I beg you will send them by *land carriage*, as they are detained a long time at *Bristol* before they arrive." This is an express order to send the goods by land carriage. The plaintiff, in obedience to this order, sends them accordingly, and they are delivered to the book-keeper of the *Birmingham* carrier, at his warehouse in *Coventry*, to be forwarded to the defendant at *Carmarthen*. The box was lost, and the witness said, that before this time his master had always sent goods to the defendant, by the way of *Bristol*, and that there was no other mode of sending them, by land carriage, than by way of *Birmingham*. There was no evidence in contradiction to this. Then what is the case? It is as much as if the defendant had mentioned the *Birmingham* carrier particularly by name; for there being but one carrier, the plaintiff had no choice by whom to send them.

If a vendor take upon himself actually to deliver the goods to the vendee, he stands to all risques; but if the vendee order a particular mode of conveyance, the vendor is excused.

With regard to the question between a vendor, and the general creditors of a vendee, who becomes a bankrupt, as in the case of *Birkett* versus *Jenkins*, a vendor before actual possession by the vendee, has a lien upon the goods he sends; and if he can get them *in transitu*, to be sure he has the benefit of that lien. But that has no relation to a transaction, as this is, between vendor and vendee,

Therefore

Therefore I am of opinion that the rule for setting aside the *non-suit* should be made absolute, and a new trial granted.

The three other judges concurred.

Rule absolute without payment of costs.

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REX *versus* JACKSON.

Monday,
May 29th.

THE defendant had been convicted upon *Stat. 28 Ed. 1. c. 20.* for making silver plate of worse alloy than the standard alloy of the realm. The indictment contained also a count upon *stat. 6 Geo. 1. c. 11.* and a third count for an offence at common law. The defendant was found guilty upon all the counts. In *Michaelmas* term 1774, Mr. *Dunning* moved in arrest of judgment upon the ground of the *Stat. 28 Ed. 1. c. 20.* being repealed; when the court took time to consider, and to look into the several acts of parliament.

The *Stat. 28 Ed. 1. c. 20.* which prohibits the making silver plate under the standard alloy, is not repealed by any of the subsequent statutes against the same offence: they only add accumulative penalties.

Lord *Mansfield* now declared the opinion of the court, as follows.—This is an indictment against the defendant, for making silver plate under the standard alloy; and a motion has been made in arrest of judgment, founded upon this objection, namely, that the *Stat. 28 Ed. 1. c. 20.* which is one of the statutes against which the offence is laid, is repealed. This statute being a prohibitory law, if it be still in force, the proper remedy under it is by indictment. We are all of opinion *it is still in force*, and not repealed or abrogated by any of the subsequent statutes since enacted. This statute is the first statute on the subject, and inflicts a punishment of *imprisonment*, and by ransom at the king's pleasure, on goldsmiths who shall make silver wares worse than the sterling alloy.

The sterling alloy is eleven ounces two pennyweights of fine silver, and eighteen pennyweights of alloy in the pound weight troy; which the mint indenture calls the *right old standard* for the silver monies of *England*; and it was in use before the conquest, as appears by the several treatises on silver coins. The *Stat. 2 H. 6. c. 14.* inflicts a penalty of double the value, on goldsmiths selling or setting to sale silver wares, worse than sterling, or before touched or marked. The *Stat. 18 El. c. 15.* inflicts a forfeiture of the value, on goldsmiths working, selling, or exchanging silver plate, less in fineness than eleven ounces two pennyweights, or before they have set their mark thereto. The *Stat. 21 Jac. 1. c. 28. sect. 11. No. 45.* repeals the words in the *Stat. 28 Ed. 1.* "that none shall make kings' crosses or locks." The *stat.*

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8 W. 3. c. 8. *sect.* 9. made to encourage the then silver coinage, abolished or suspended the *old* standard of eleven ounces two pennyweights, and established the *new* standard of eleven ounces ten pennyweights in it's stead, and inflicted a forfeiture of the plate, or the value thereof, on persons working or putting to sale, or exchanging any manufacture of silver, less in fineness than eleven ounces ten pennyweights, or until marked with the new sterling marks. The *Stat.* 6 Geo. 1. c. 11. *sect.* 1. and 3. revived and established the old standard of eleven ounces two pennyweights, instead of the new standard eleven ounces ten pennyweights, and continued the new standard penalties for securing the said old standard; and *sect.* 2. enacted that no goldsmith should be obliged to work silver plate according to the new standard. *Sect.* 41. continued both the old and the new standards, and directed them to be marked with distinguishing marks; and subjected offenders to the *penalties and forfeitures* prescribed by any of the laws then in being concerning wrought plate. The *Stat.* 12 Geo. 2. c. 26. in the preamble *recites* the statute of 28 Ed. 1. 2 H. 6. and 18 Eliz. and two other acts respecting country assay offices, and recites them as *subsisting laws*; and that notwithstanding the aforesaid acts of parliament, great frauds were daily committed in the manufacturing gold and silver wares, for want of sufficient power effectually to prevent the same: And therefore, *sect.* 1. inflicts a penalty of 10 l. for every offence, recoverable by action: But this act says not one word as to the repeal of any of the former laws.

Now it is a general rule, that subsequent statutes which add accumulative penalties, do not repeal former statutes. 6 Mod. 140. 11 Rep. 63. b.

I am furnished with two precedents, one in *Hil.* term 1758. *Rex* versus *John Priest*; the other in *Michaelmas* term 1759. *Rex* versus *Richard Hawkins*; both of which were tried before me, and where the court afterwards, upon motion for judgment, pronounced sentence of *fine* and *imprisonment*, viz. in the former 6 s. 8 d. and six months imprisonment; in the latter 6 s. 8 d. and three months' imprisonment. No objection was in either of those cases made, nor was there any argument. Therefore, I suppose it was taken for granted, as it is at this time by the goldsmiths' company, that the statute was still in force. We are all of opinion it is in force, and consequently that the indictment is good.

Per cur. *Rule for arresting the judgment discharged.*

THE END OF EASTER TERM.

Trinity

TRINITY TERM

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15 GEORGE III. B. R. 1775.

HOGAN Lessee of HENRY WALLIS, Esq. and others,
versus ROWLAND JACKSON, Esq.

Tuesday,
 June 20th.

ERROR upon a judgment of B. R. in Ireland in ejectment.

Upon not guilty pleaded, the jury found a special verdict, the material facts of which were as follow; That the Reverend *George Jackson*, deceased, being seised of the towns and lands of *Coolisball* and *Glanbegg* in fee, and of the lands of *Ballyduffultra*, and *Ballygally*, for *lives renewable for ever*, without impeachment of waste, and of other lands under leases for three lives, with reversionary terms for twenty-one years, from the death of the surviving life, named in each lease, of one of which, viz. of a house called *Geoghegans*, and some *burgess* lands, the said *George Jackson* was the surviving life; and being also possessed of personal assets, to the amount of 1,300*l.* duly made his will, by which, after disposing of his soul and body, he made the following disposition of his estate.

One seised of the lands of C. and G. in fee, and of other lands of B. and B. for lives renewable for ever, and of other lands under leases for three lives with reversionary terms for 21 years, from the death of the surviving life in each lease; and being himself the surviving life in one, devises thus: And as to my worldly substance, I give to my mother my house and lands of G. with the

“AND AS TO MY WORLDLY SUBSTANCE, I give and bequeath
 “to my dearly beloved mother, *Mary Jackson*, my house and
 “lands of *Glanbegg*, and all their appurtenances, for and during
 “the term of her *natural life*, clear and free of any deduction
 “or charge whatsoever: And also the lands of *Ballygally*,
 “subject to the rent only payable thereout, for the term of
 “her *natural life*, without liberty of committing waste thereon.”

appurtenances during her *natural life*, clear of any deduction; and also my lands of B. subject to a rent payable thereout, for *life*, without liberty of committing waste thereon; and after several legacies and annuities to different relations, to his heir at law, and to the natural children of his brother, devises to his mother, *all the remainder and residue of all his effects*, both real and personal, which he shall die possessed of. The mother by the residuary clause takes a fee in all the testator's fee simple estates, and the whole of his interest in the rest of his real property, subject to the charges thereon.

He

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* *Edward Jackson* was the presumptive heir of the testator.

Devise upon which the question arises.

He then gives to *Ellen Corkeran*, the sum of 30*l.* to be paid her yearly, during her life, for the support of herself and her son *George Jackson*. To her daughter *Ellen*, and her son *John Jackson* respectively, the yearly sum of 20*l.* to be paid half yearly, till their respective ages of twenty-one years; and then he gives them respectively the sum of 500*l.* He gave the said *George Jackson* the yearly sum of 20*l.* till the age of twenty-one; and then the sum of 400*l.* All which bequests were to be raised and levied out of his lands of *Glanbegg* and *Coolisball*, *Ballygally*, and *Ballyduffultra*. He also gave his cousin *Henry Wallis*, the sum of 1,000*l.* sterling, to be paid him as soon as conveniently might be after his decease. To his uncle *Edward** *Jackson*, the yearly sum of 30*l.* sterling during his life. He also gave unto his uncle *John Wallis*, the sum of 100*l.* sterling. And unto his relation *William Kenah*, and *Jane* his wife, the sum of 200*l.* sterling.

And then devised as follows, "I also give and bequeath unto my dearly beloved mother, *Mary Jackson*, all the REMAINDER and RESIDUE of ALL the EFFECTS both REAL and PERSONAL, which I shall die possessed of." And concludes with the appointment of *executors*, &c.

That the testator died without altering or revoking his said will, leaving *Edward Jackson* his heir at law; who died intestate, leaving the defendant his only son and heir at law. That *Mary Jackson*, under whom the lessors of the plaintiff claimed, died seised, &c. That the lands of *Glanbegg* and *Ballygally* were, at the date of the will, of the yearly value of 150*l.* subject to a payment of 45*l.* per annum, and the woods belonging thereto, worth 200*l.* That the lands of *Coolisball* and *Ballyduffultra*, were of the yearly value of 350*l.* subject to 60*l.* a year quit-rent; and the woods belonging thereto, in the year 1769, worth 4,500*l.* That the lands of *Glanbegg* and *Coolisball*, were incumbered to the amount of 4,900*l.* at the date of the will, and 4,500*l.* at the testator's death. That all the legatees were alive at the testator's death. That the yearly value of the testator's *chattels real*, was 30*l.* and the *gross* value at the time of making his will, and at his death, was 240*l.*

The question upon these facts was, Whether the lessors of the plaintiff were entitled?

After several arguments in the court of *King's Bench*, in *Ireland*, the court gave judgment in favour of the defendant, *Rowland Jackson*, against the opinion of Mr. Justice *Robinson*.

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Mr. *Alleyne* for the plaintiff, stated the question to be, Whether under the residuary clause, all the testator's real estates passed to his mother *Mary Jackson*, in so full and ample a degree, as to enable her to devise the same to the lessors of the plaintiff? And he insisted they did.

First, It is apparent, that the great and chief object of the testator's bounty was his mother. Therefore, by way of securing a certain provision to her, he first gives her a life estate in two denominations of his real property: he then proceeds to dispense his bounty amongst all his other relations; and perceiving there was still a surplus undisposed of, by one general sweeping clause, he devises to his mother every species of property he should die possessed of.

Secondly, That the testator did not mean to die intestate, as to any part of his real or personal property, is manifest, not only from the strong language of the residuary clause, but from the introductory words of the will, "*As to all my worldly substance*," which have always been understood to include both real and personal estate, and to indicate an intent in the testator, who uses them, to dispose of all his property. 2 Vern. 690. *Beachcroft v. Beachcroft*. "*All his worldly estate*," comprises all a man has in the world. *Ibbetson v. Beckworth*, *Forrester*, 157, "*As touching my worldly estate*," in the introductory part of a will, is strong proof that a testator means to dispose of all his property.—*Grayson v. Atkinson*. 1 Wilf. 333. "*As to all my temporal estate*," I give, &c. as follows; and afterwards the testator concludes thus: "*All the rest of my goods and chattels, real and personal, moveable and immoveable, as houses, tenements*," &c. without the word *estate*, held, to pass a fee.—*Tanner v. Wise*, "*As to my temporal estate*," I devise as follows; and afterwards devises the *rest and residue* of his *estate, goods, and chattels*; held, that these words passed a fee. 2 Atk. 37. 3 Burr. 1,618.—*Gulliver ex dem. Jefferies v. Poyntz*. Mich. 11 Geo. 3. C. B. a devise of a *messuage*, &c. to *A.* with special circumstances, was held to carry arable, meadow, and pasture lands, appurtenant to the said messuage. Therefore, any words which indicate an intention of the testator to dispose of *all* his estate, will take effect and pass every part of his property.

It may be objected, that the words, "*all the remainder and residue*," cannot take in all the testator's estate, but only such parts of it as are not before mentioned or devised. But in *Alleyne*, 28, devise of a manor to *A.* for six years, and afterwards the residue of all his lands to *J. S.* was held to pass the reversion of the manor.

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manor. So in *Norton v. Ladd*. 1 *Lutw.* 755. upon a devise to *A.* for life, and after her decease, the whole remainder of the lands to *B.* it was held, a remainder in fee simple passed. In *Chester v. Chester*, 3 *P. Will.* 56. *A.* on the marriage of his son *B.* settled part of his lands on *B.* in tail, and being seised in fee of the reversion of these lands, and of other lands in possession, devises all his lands and hereditaments, not otherwise by him settled or disposed of; and it was held the reversion in fee passed. He also cited *Rogers v. Rogers*, *Forrester*, 268, and *Ridout v. Payne*, 3 *Atk.* 486. and prayed judgment of reversal.

Mr. Buller, contra. All the cases cited by *Mr. Alleyne*, are distinguishable from the present, 1st. It is an established rule of law, that an heir at law shall not be disinherited, but by express words or necessary implication. 2^{dly}, It is a settled rule in the construction of wills, that the whole of the will must be taken together, and nothing is to be rejected which has a determinate and fixed meaning in itself. And 3^{dly}, Where words used by a testator are indifferently applicable to real and to personal estate, they shall not be applied to the real, in disinherison of the heir at law.

First, There is clearly no express devise of the real estates. The word *effects* is properly applicable only to personal estate. All the dictionaries explain it by the words "goods and moveables." And as to the word *real* annexed to it, it can apply only to *chattels real*, which it is found by the verdict the testator died possessed of: so that it is not a nugatory or superfluous word. Nor is there any necessary implication, that the testator intended any greater interest in his real property for his mother, than the estate for life expressly limited in the two denominations. On the contrary, such an implication would be forced and inconsistent: for, to what purpose in the first part of his will could he want to restrain her from committing waste, if it was his intention, in the latter part of it, to give her the absolute property and dominion over it?

But *secondly*, it is contended, that the *introductory* words, "As to all my worldly substance," indicate an intention in the testator to dispose of all his property; and several cases have been cited. As to *Beachcroft v. Beachcroft*, 2 *Vern.* 690. and *Ibbetson v. Beckwith*. *Cas. temp. Talbot*, 157; in both those cases, the introductory words were, "As to all my worldly estate;" and so were the words of the subsequent devise in those cases, "my estate." Now the word *estate*, is a technical, legal expression, and properly applicable to real estates; and, therefore, a devise of "all a man's estate,"

"*estate*," has been held to carry a fee, without any words of limitation. But here the introductory words are, "*worldly substance*," which are the mere formal words of the scrivener, without any legal signification annexed to them. At most they can only import, that the subsequent dispositions in his will relate to his worldly substance; but they in no wise express or imply the extent or *quantum* of such dispositions. The case of *Grayson v. Atkinson*, 1 *Wils.* 333. instead of being an authority for the plaintiff, is in point for the defendant. For there, Lord Hardwicke said, if the testator had not, by using the words, "*as houses, gardens, tenements*," &c. sufficiently explained what he meant by the "*REST of his goods and chattels REAL and personal, moveable and immoveable*," those words would not pass a fee by the law of *England*, though they might have so done by the civil law. Thirdly, The words "*remainder and residue of my effects, both real and personal*," do not necessarily refer to *real estate*, but are equally applicable to *personal*; and if so, they shall not be extended to disinherit the heir at law. *Pre. Chan.* 471, *Piggot v. Penrice*. "There *A.* made one executrix of all his goods, lands and chattels, and died, not having any *leasehold* interest." Lord Cowper said, "whatever his private opinion might be of the intention of the testatrix, to pass her lands, of *inheritance*, yet in point of judgment he could not decree for the executrix; because an heir is never to be disinherited but by express words, or necessary implication."—But 12 *Mod.* 592. is expressly in point. There the testator being seised of *five* messuages, after making a complete devise of *four* of them, said, "*and all the overplus of my estate to be at my wife's disposal*:" And it was held, the *fifth* house did not pass by this strong residuary clause. *Trevor, C. J.* said, "In the construction of *Wills*, generally the words, "*my estate, the residue of my estate, or the overplus of my estate*, may well pass an inheritance, where the intention is *apparent*; but it must be *very apparent*, and *necessary* from the words of the will. For if the words be indifferent to real and personal estate, or may be applied to personal estate alone, there the heir at law is not to be disinherited."—Here, the other parts of the will are so far from requiring such a construction, that we destroy them if we admit it. The words, in their most proper sense, apply, to *personal estate*: They immediately follow the dispositions which affect *only the personal estate*; and the chattels real, left by the testator, shew the reason for his annexing the word *real to effects*; which otherwise properly mean *moveables* only,

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only, and fully satisfy those words. They ought not therefore to be extended to real estate. But suppose they were applicable to real estate, the mother could at most take only an estate for life, because no words of limitation are added; and without words of limitation, a devisee of real estate can only take an estate for life in the premises bequeathed to him. He cited also *Frogmorton v. Wright*. 3 *Wils.* 415. and *Wilkinson v. Merriland*, 3 *Crok.* 447-9. in which latter case the court held, that a devise "of the residue of all his goods, leases, estates, &c. whereof he was possessed," did not pass lands in mortgage forfeited; and the rather, because of the words, "whereof he died possessed," because they relate only to personalty. Here the words are, "whereof he shall die possessed."—Fourthly, Words of doubtful construction shall not overturn former words that are clear and express. *Bamfield v. Popham*. 2 *Vent.* 449. 451. 1 *P. Wm.* 54-5. S. C. Here, the case is not only doubtful, having been argued four times before in *Ireland*; but the devise to the mother for life, without power of waste, is incompatible with an intention to give her the same land in fee. Therefore, upon the whole, the rules of law must take place, and the title of the heir at law be preferred.

LORD MANSFIELD.—There is but one point upon which the whole case turns: which is, to fix the meaning of the word *effects* in the *English* language. It is nugatory to cite cases, unless you fix the meaning of the term to which they are to be applied. If the word *effects* is equivalent to *worldly substance*, used by the testator in the beginning of his will, or if it is synonymous to property, there is an end of the question: because then all the cases prove, that the sweeping clause passes a fee. On the contrary, if it can be shewn that *effects* mean *chattels*, or personalty only, then the residuary clause can include them only. I take *effects* to be synonymous to *worldly substance*, which means whatever can be turned to value; and, therefore, that real and personal effects mean all a man's property.

Mr. *Alleyne*, in reply, endeavoured to shew that the words "real effects" were equivalent to *real assets*, and that real and personal effects meant, in the place the testator used them, all the property he had in the world.

LORD MANSFIELD.—As this cause has already been nine years depending in *Ireland*, and as the court has no difficulty upon the question, which turns upon the construction of a very few words of the will, I think it is right that

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that we should give our opinion directly, without adding further delay, by deferring it to a second argument.

His Lordship enumerated the different species of the testator's property, and stated the different bequests of the will, which he observed were material to be attended to in the construction of it, and then proceeded thus :

This cause was commenced in the life time of Mrs. *Mary Jackson* ; but she is now dead, and by her will has left the estate, which is the particular property in question, to *H. Wallis* the cousin of *George Jackson* deceased (to whom by his will he gave the legacy of 1000 l. before-mentioned) and to the three natural children of *Ellen Cockeran*, who are the lessors of the plaintiff.

The question which arises upon this special verdict and upon the construction of this will is, Whether, by virtue of the sweeping clause, any real property at all passed to *Mary Jackson*, the mother of the testator ? and if any did, Whether any thing passed except the covenant for the term of 21 years, in the house called *Geoghegans* and *Burgefs* lands thereto belonging, being a title to a *chattel real* ? And if the rest of the real property of the testator, or a remainder therein, passed, Whether it can pass for a longer time than during the life of *Mary Jackson*, because there are no words of limitation ?

By the *Roman* law, a will constituted the *heres* or heir, and was the appointment of him. He was the same person as in our law is termed the executor. But the nomination of an heir was so essential an ingredient of the *Roman* testament, that there could be no complete will without him ; and from his name and office, he was considered, at the death of the testator, as universal successor to all the goods, rights, and property of the deceased ; without any regard or distinction as to property acquired by him, prior or subsequent to the time of making his will.

But that is different from the nature of a devise of land by the law of *England*, which formerly admitted of no testamentary disposition, in cases of real property. This restriction took place upon the introduction of military tenures, and was a branch of the feudal doctrine of non-alienation without the consent of the Lord. But when the rigour of the restriction came by degrees to be relaxed, and tenants were permitted to make dispositions by testament, a devise of lands operated as an appointment to uses, in nature of a legal conveyance. As such, the courts of law in the construction of them held, that a devise affecting lands could operate only upon such real estates as the testator had at the time

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of executing and publishing his will ; and not upon any after purchased or acquired lands : Because there could be no legal conveyance at common law of what a man should acquire in future.

Another distinction, founded upon the notion that a will affecting lands is merely a species of conveyance, and derived from the same source, is this. The law of *England*, in the conveyance of real estates, requires words of limitation in the donation or grant, to the creation of a fee. Without the word *heirs*, general or special, no man can create a fee at common law by conveyance. When wills therefore were introduced, and devises of real property began to prevail ; being considered as a species of conveyance, they were to be governed by the same rule. Therefore, by analogy to that rule, in the construction of devises, if there be no words of limitation added, nor words of perpetuity annexed, which have been held tantamount, so as to denote the intention of the testator to convey the inheritance to the devisee ; he can only take an estate for life. For instance, if a testator by his will says, I give my lands, or such and such lands to *A.* ; if no words of limitation are added, *A.* has only an estate for life.

Generally speaking, no common person has the smallest idea of any difference between giving a person a horse and a quantity of land. Common sense alone would never teach a man the difference ; but the distinction which is now clearly established, is this : If the words of the testator denote only a *description* of the *specific estate* or *lands devised* ; in that case, if no words of limitation are added, the devisee has only an estate for life. But, if the words denote the *quantum* of *interest* or property that the testator has in the lands devised ; there, the *whole* extent of such his *interest* passes by the gift to the devisee. The question therefore is always a question of construction, upon the words and terms used by the testator. It is now clearly settled, that the words "*all his estate*," will pass *every thing* a man has : But if the word "*all*" is coupled with the word "*personal*" or a *local description*, there, the gift will pass only personalty, or the specific estate particularly described.

All these principles being clearly settled and certain, the question in this case comes to a question of construction upon the will itself. Now, in this will, there are several things which it is material to observe. And first, the *introduction* is very material. Introductory words cannot vary the construction of a devise, so as to enlarge the estate of a devisee, unless there are words in the devise itself sufficient to carry the degree of interest
contended

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contended for. But wherever they assist to shew the intention of the testator, the courts have laid hold of them, as they do of every other circumstance in a will, which may help to guide their judgment to the right and true construction of it. The introductory words used by the testator in the present case, are not strict legal terms; but they are the words of a plain man of sound learning. He says, "*As to all my worldly substance, I give, &c.*" What is *substance*? It is *every property* a man has. So, in the *Statute 4 and 5 Phil. and Mar. c. 8.* for the punishment of such as shall take away maidens that be inheritors, the word *substance* is made use of, and means *worldly wealth*.

Thus the testator sets out. He then proceeds to dispose of his property, and in the course of his will provides for every body: For his mother, his uncle, his mistress, his natural children, his cousins; and makes a particular provision for his heir at law, which provision is to continue *during his life*. To be sure, that circumstance alone would not exclude the heir from taking any thing not disposed of. But it furnishes an argument in favour of the construction contended for by the representatives of the mother; namely, that he intended the remainder of every thing to go to her by the subsequent residuary devise; and that he did not mean to die *intestate* as to any part of his property. He adds the sweeping clause, after all the provisions before mentioned; at the same time not meaning to make his mother executrix. What purpose then was it to answer? I confess I can see none, unless it were to dispose of all his worldly substance agreeable to his declaration in the introductory part of the will. The words are, "I also give to my mother all the *remainder* and *residue* of *all the effects*, both *real* and *personal*, which I shall die possessed of." Now, is the true construction of these words to be confined to a gift of *personalty* only? Most clearly not; because the testator has expressly added the word *real* to the word *effects*. Do the words *real effects* in law, mean *real chattels* only? No authority has been produced to shew that they do: And in point of fact, there was but one lease belonging to the testator in this case which could come under that description: Consequently, if the construction contended for by the defendant were the true one, only that lease would pass; which would be to narrow the construction of the word *real* very much indeed. The natural and true meaning of *real effects* in common language and speech is real property; and *real* and *personal effects* are *synonymous* to *substance*, which includes every thing that can be turned into money.

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• Vide stat.
4 & 5 Ann.
c. 17. sect. 1.
stat. 5 Ann.
c. 22. sect. 1.
stat. 3 Geo. 1.
c. 12. sect. 2.
stat. 5 Geo. 1.
c. 24. sect. 1.
stat. 5 Geo. 2.
c. 30. sect. 1.

In several clauses of the bankrupt laws which make it felony in a bankrupt to conceal, remove, or embezzle any part of his goods, wares, merchandize, monies or *effects* *; the word "*effects*" is made use of in this sense. If that be the true construction, there can be no doubt, but that the words, *remainder of real effects*, include the reversion of every thing not disposed of; in which case, no words of limitation were necessary.

But an objection has been made from the testator's giving his mother a *specific estate for life*, and making that estate liable to *impeachment of waste*; which, it has been strongly contended, is totally repugnant to and inconsistent with an intention to give her the absolute property in a subsequent part of the same will. As to that, there might possibly be reasons for his doing so, especially as he had, in respect of that specific estate, given her a preference to all his general creditors and legatees; by devising it free of all incumbrances. But I do not think the objection of *itself* sufficiently strong, to controul the manifest operation of the subsequent words, used by the testator in the residuary devise. It would be going a great way indeed, to lay it down as a general rule, that where a particular estate is given to a person in one part of a will, and the testator afterwards devises to him in more general words, that he shall not reap any benefit of such residuary devise. Indeed, as to this objection, the case of *Ridout v. Paine*. 3 Atk. 486. is exactly in point. There, the testator, in the first instance, gave his wife only an estate *for life*, in part of his real estate, and afterwards bequeathed her the *residue*, &c. The objection of inconsistency, now so strongly relied on, was there made; but Lord *Hardwicke* over-ruled it, and held the residuary clause carried the inheritance notwithstanding. That case is also very near in point as to the other objections made to day. For the only difference between the sweeping clause in that case and this, is, that the word *estate* is used instead of *effects*. Here the words are, "All the remainder and residue of all his *effects*, both real and personal," which includes all the testator's property. All the terms he makes use of, except the word "*effects*," are technical terms: For *remainder* is applicable to *real* estate, and *residue* to *personal* estate. Therefore the same rule of determination that was held in the case of *Ridout v. Paine*, ought to hold in this case. Upon the whole of the will taken together, I am clearly of opinion, that the testator meant his mother should take the whole of his property, under the residuary devise, and that the words he has made use of are sufficient

sufficient to effectuate that intention: Consequently that she took a fee in the fee-simple estates, and the whole of the testator's interest in the rest of his real property, subject to the charges thereon. The result is, that the lessors of the plaintiff are entitled, and that the judgment of *B. R.* in *Ireland* must be reversed.

Aston, Justice. I am of the same opinion as I was before *. When this question came on in the *Common Pleas*, in *Ireland*, the mother was alive; therefore it was immaterial whether she took an estate for life or in fee. The words "*real effects*" may relate to real estate; and there are many acts, both in the *English* and *Irish* statutes, in which they can relate to nothing else. So, the word "*substance*" is applicable to real estate, in the *statute* 4 and 5 *Phil.* and *Mar. c.* 8. I think the intention of the testator in this case is very clear. Therefore, the judgment must be reversed.

Mr. Justice *Willes*, and Mr. Justice *Ashurst* were of the same opinion.

Per cur. Judgment reversed.

Afterwards, upon a writ of error in the House of Lords, on the 2d of *December* 1776, the judgment of *B. R.* reversing the judgment of the court of *B. R.* in *Ireland*, was affirmed.

BALDWIN *versus* KARVER *et al.*

Tuesday,
June 20th.

THIS was a case out of Chancery for the opinion of this court; the material facts of which were as follow:

Richard Ashwin being seised and possessed of a considerable real and personal estate, made his will on the 8th of *June* 1756, and thereby, after making provision for his wife, and leaving certain legacies, divided the residue of his estate thus: "I do hereby give and bequeath all the rest, residue, and remainder of my personal estate and effects whatsoever, not herein before, or herein after bequeathed, unto my said wife, *Sarah Ashwin*, *Thomas Taylor*, and *John Karver*, to hold all and singular the said lands, tenements and premises, and personal estate whatsoever, to them my said trustees, and the survivor and survivors of them, and the heirs, executors, and administrators of such survivor, in trust nevertheless, that they, my said trustees, and common. By a codicil bearing even date with the will, the testator directs the trustees to pay the interest and produce of his real and personal estate to his wife *S. A.* and to the said *J. A.* and *R. A.* during their lives, with survivorship. Eight grand-children were alive at the date of the will: a ninth was born before the testator died: twelve more were born after his decease, and all in the life time of *R. A.* who died without issue.—Held, that as the twenty-one grand-children were all alive at the death of *R. A.*, all were equally entitled.

Devise to trustees, in trust for the use of the heirs male of *J. A.* in default of such issue, to the use of the heirs male of *R. A.* and in default of such issue male, to the use of all and every the grand children of *J. A.* and *S. M.* as tenants in

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“ the survivor and survivors of them, and the heirs, executors,
 “ and administrators of such survivor, do, and shall stand seised
 “ and possessed of the said lands, premises, and personal estate
 “ and effects, *to and for the use and behoof of the heirs male of*
 “ *the body of my nephew John Asbwin*; and in default of such
 “ issue male, then to the use and behoof of the heirs male of the
 “ body of my nephew *Richard Asbwin*; and in default of such
 “ issue, then to and *for the use and behoof of all and every the*
 “ *grandchildren of my late brother John Asbwin, deceased*; and
 “ the grandchildren of my late sister *Sarah Morris, deceased, to*
 “ *hold all and singular the said lands and premises, to them the*
 “ *said grandchildren of my said brother John Asbwin and Sarah*
 “ *Morris, and their heirs, as tenants in common, and not as joint*
 “ *tenants*; and my *personal estate and effects, to be equally divided*
 “ *between them, share and share alike.*”

That the said testator added three several codicils to his will, the first of which was as follows: Whereas I *Richard Asbwin* have this 8th day of *June 1756*, made and executed my last will, but I have therein omitted to dispose of the residue and increase of the surplus, and remainder of my real and personal estate; now I do hereby order, will, and direct, that my said trustees herein named, shall pay and dispose of all the interest, and produce, and increase, that shall from time to time arise, or be made of my said real and personal estate, unto my said wife *Sarah Asbwin*, and my nephews *John Asbwin* and *Richard Asbwin*, and to their assigns, share and share alike, with survivorship, for and during the term of their three natural lives.

That the testator died on the 6th of *November 1758*, leaving *John Asbwin* and *Richard Asbwin* his nephews, and the said *John Asbwin* his heir at law.—That the testator's said nephews, *John* and *Richard Asbwin*, are since dead without issue, and *Sarah Asbwin*, the widow, is also since dead, and that *Richard Asbwin* was the survivor of them.

That eight grandchildren, viz. two of *Sarah Morris*, and six of *John Asbwin*, were alive at the time of the testator's making his will. A ninth, viz. a grand daughter of *John Asbwin*, was born after the will, and before the testator died. After his decease, twelve more grand-children of *John Asbwin* were born, and all of them in the life-time of *Richard*.

The question was, Whether all, or any, and which of the grandchildren of the testator's late brother *John Asbwin*, and his sister *Sarah Morris* deceased, were entitled under this devise?

This

This case was argued twice : first on *Friday February 3d in Hilary Term, 15 Geo. 3.* by Mr. *Pepys* for the plaintiff, and Mr. *Wallace* for the defendants ; and again, in *Easter Term* last, by Mr. *Dunning* for the plaintiff, and Mr. *Mansfield* for the defendants.

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For the plaintiff it was argued, that those grandchildren *only* who were *alive at the date of the will*, or at most the *other* grandchild born after the will, and *before the testator's death*, could be entitled ; and such was the rule established by all the authorities in the books, in cases where, like the present, there were no peculiarity of circumstances to guide the court as to the real intention of the testator.

That the will and codicil being both executed on the same day, must be taken together ; but so as not to lose sight of the order of time. That by the will, no legal estate was vested in the trustees, but by the codicil they had a good estate of freehold during their lives ; and there was a vested remainder in the *nine* grandchildren born in the life-time of the testator, subject only to a contingent remainder to the issue male of *John and Richard*.

LORD MANSFIELD. The single question is, *which* of the grandchildren are entitled, not what estate they are to take.

Mr. *Pepys*. But there was a remainder vested in those who were alive at the testator's death : For it is an established rule of law, that wherever an estate of freehold is limited to a person for life, with contingent remainders, and an ultimate remainder in fee to a person *in esse*, if none of the intervening remainders amount to a fee, the ultimate remainder is vested. *Chudleigh's Case*, 1 *Rep.* 137 ; and till the contingent remainder takes place, the right of timber upon the lands is in the ultimate remainderman. *Uvedale versus Uvedale*, 2 *Roll. Abr.* 119. tit. *Maresme*, pl. 3. the doctrine of which case is recognized in *Whitfield versus Bewit*, 2 *P. Wms.* 240. Therefore, upon these authorities, there was clearly a vested remainder in the grandchildren alive at the time of the testator's death ; and if vested, it could not be divested by any other grandchildren who might afterwards come in *esse*.

Secondly, With respect to the *intention* of the testator, and the *inconvenience* that would arise from extending the limitation to *all* the grandchildren who might exist *in futuro*, they contended, that it was more natural for the testator to mean such grandchildren only as were then in being, and whom he knew, than those who might afterwards be born, who were indefinite in number, and the time of their coming in *esse* so uncertain, that

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either the grandchildren alive must wait till their number could be ascertained before any division, or there must be a new partition upon the birth of every additional child. Besides, in that case, if any of them were to die, their father would come in as administrator, contrary to the manifest intention of the testator. — They cited 2 *Atkins*, 121. 1 *Vez.* 114. — *Pre. Chan.* 470, and 1 *P. Wms.* 342. and *Gilb. Cases in Equity*, 136. S. C.

For the defendants it was contended, that the apparent intention of the testator was to include *all* the grandchildren of *John* and *Sarah*, who should be alive at the death of *John* and *Richard* without issue. That in respect of the real estate it was clearly a good remainder; and as to the devise of the personal, it was within the rule of *contingencies* with a double aspect.

As to the question, *which* of the grandchildren were entitled, the benefit intended by the testator was clearly a future and contingent benefit; because, till the death of *John* and *Richard* without issue, nothing was given to any of the grandchildren; and therefore, till then nothing vested: Consequently the testator intended, that all who were in *esse* at that time should take. That the rule of law, as to the time of vesting, was not, as had been contended on the other side. But supposing this estate in common did vest in the grandchildren alive at the testator's death, yet it might be divested in the event of future grandchildren coming in *esse*: Because the estate both of tenants in common and joint-tenants, may vest at different periods. *Co. Lit.* 188. *a. Moore*, 220. *Stanley versus Baker. Pollexfen* 373. 2 *Vern.* 545. *Cooke v. Cooke.* 1 *Ld. Raym.* 310. 2 *Str.* 1172.

Upon the first argument, Lord *Mansfield* started a doubt, whether the devise of the *personal* estate to the grandchildren was not *too remote*. — Upon the second argument his Lordship said, I have no doubt as to the question which of the grandchildren are entitled. — All cases on the construction of wills depend upon the particular penning of the wills themselves, and the state of the families to which they relate, taking also into consideration some general rules to prevent property from being unalienable too long.

A *grandchild* may mean one that a person may have at *any distance of time*, according to the manner in which the testator uses the word. The great point in all cases of this kind is, the *time* when the legacy is to *vest*; for that is the period which the testator looks forward to, when he directs his property to pass from one channel into another. Here the testator does not con-

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sider the grandchildren as *immediate* objects of his bounty ; but only gives them a *possibility* or a chance, after an indefinite dying of *John* and *Richard* without issue male. He means them as another succession ; and, therefore, *all* who were *in esse* upon that contingency are equally entitled.

But my difficulty is upon the limitation of the real and personal estate. The rule of law most undoubtedly is, that a devise to the heirs general or special of a man alive is void. If the devise therefore to the heirs of the body of *John* is to be construed an immediate devise, it is of course void. But suppose, by incorporating the will and codicil together, the devise of the real estate could be supported ; still it strikes me, as at present advised, that the subsequent limitation of the personalty is too remote. Therefore let notice be given to the heir at law of the testator, and to the personal representative or next of kin of *John*, that they may be heard by their counsel if they think proper.

ASTON Justice—As to the question which of the grandchildren are entitled, the material consideration in all the cases in the books has been, the time when, or the contingency upon which, the devisees are to take : and beyond that time none have been let in. *Heath v. Heath*. 2 *Atk.* 121. *Warren versus Johnson*, 2 *Ch. Rep.* 69. *Ellison versus Airey*, 1 *Vez.* 114. Where there is a devise to the children of *A.* who has only *one* child born at the time of the will, *all* the children *born after* may be let in. *Bateman v. Roach*, 9 *Mod.* 104.

Adjournatur.

But now in this term, no counsel appearing for the heir at law or the personal representative of *John*, Lord *Mansfield* delivered the opinion of the court as follows :

A doubt occurred upon both arguments, whether *any* of the grandchildren at all were entitled. *First*, In respect of the real estate, as being devised to the heirs male of *John*, who was alive at the death of the testator : and, *Secondly*, In respect of the personal estate, as being too remote.—As to the first, it was said, that the codicil, by which the rents and profits are given to *Sarah*, *John*, and *Richard*, during their lives, was made to obviate this objection ; and if so, they would take a joint estate during their three lives, with limitation in tail male to *John* and *Richard*, with remainder in fee to the grandchildren. But in that case, the subsequent devise of the personalty would be too remote : for *John*, as being the first tenant in tail, would take the absolute property.

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Upon the last argument it was said, that the devise of the real and personal estate might be considered as a devise upon a *double* contingency; that is, in case *John* should have a son living at his death, then to such son; but if none, then to the grandchildren.

Upon that way of stating it, it does occur that the whole may be supported. It is clear by the *will*, that nothing was meant to pass to *John* the ancestor; the devise is to the *heirs male of his body*. But those words are followed by others, which shew that the testator meant to use them as *synonymous* to "*issue male*:" For he goes on thus; "and in default of *such issue male*." Supposing he did use them as *synonymous*, to be sure the reasonable construction is, that he meant such person as should be *issue male* at the time of the death of *John*, and if he left no *issue*, then to the grandchildren.

As to the question, *how many* of the grandchildren are to take, it must in all cases depend upon the subject matter of the will. The doctrine is very well laid down in the case of *Ellison versus Airey*, 1 *Vez.* 114. Where one devises to *children*, if it be an *immediate* devise, there it shall only be intended to relate to children *in esse* at the time. There is a material distinction between this sort of bequest, and a provision for children in marriage settlements: because in them, as there are no children *in esse* before the marriage, and the number is uncertain, it must be supposed the benefit was intended equally for all. But if in a will, a devise is limited to *children* by way of a remainder, or upon a contingency which in the contemplation of the testator is uncertain *when* it may take place, if it ever happens at all; there the same reason holds, why it should not be confined to those only who were alive at the time of making the will. Here, the devise is a remainder after two estates tail. Therefore we are clearly of opinion that all the grandchildren *in esse*, at the time when the devise vested, were equally entitled to take; which in fact includes all who are before the court, for they were all alive at the death of *Richard*.

If either *John* or *Richard* had had a son living at their death, there would have been an end of the limitation over.

* June 23.

The certificate was in these words*: "Having heard counsel
" on both sides, and considered this case, a doubt occurred, whe-
" ther the devise of the real estate, as it stands upon the *will*
" alone, was good; and if it was coupled with the codicil, whe-
" ther the absolute property of the *personal estate* would not vest
" in

" in *John* : and, therefore, we directed notice to be given to the
 " heir at law of the testator, and the personal representative or
 " next of kin to *John*, that they might be heard by counsel if
 " they pleased. But the cause having been postponed to this
 " term, and no counsel appearing for them, we have thought
 " proper to give our opinion upon the question, as between
 " the grandchildren themselves. And, as they were *all in being*
 " at the death of *Richard*, we think they were *all equally en-*
 " titled."

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 REX versus GRUNDON et al'.
Wednesday
June 21st.

THIS was a special case reserved upon an indictment against the defendant and others, for an assault upon *Charles Crawford, Esq*; a fellow-commoner of *Queen's College* in the University of *Cambridge*, in turning him out of the garden belonging to the said College.

Sentence of
expulsion
unappealed
from, given
in evidence
on an
indictment
for assault-
ing a fellow
commoner of
Queen's
College
Cambridge,
by turning
him out of
the college
garden; and
held
conclusive for
the defend-
ant.

Case.—On the trial, evidence was offered on the part of the prosecutor, to shew the illegality of the several sentences of expulsion of the prosecutor from the said college, and of the confirmation of the said sentences; but of which confirmation no notice was given to the said prosecutor.

If the court of King's Bench should be of opinion that such evidence was admissible on the trial of the said indictment, then the parties on both sides were to produce to the court, such part of their statutes or other instruments, as might be proper to support or invalidate such sentences; that the said court might judge of the legality or illegality of the said sentences, or either of them, for the said prosecutor's expulsion from the said college.

The questions reserved for the opinion of the court were, *1st*. Whether such evidence, as above stated, given on the trial of the said indictment, was admissible or not. *2dly*, Whether, if such evidence was admissible, the said sentences, or either, and which of them, were legal for the prosecutor's expulsion from the said college.

The cause came on before the court last term, when Mr. *Jones* for the prosecutor had begun. But Lord *Mansfield* stopped him, saying, that upon the case, as then stated, nothing appeared to the court of the foundation of the college, or of their juris-

diction,

1775. diction, or of the statutes, or of the facts; all of which were necessary to be stated to enable the court to form a judgment upon the question reserved. His Lordship said, if the prosecutor were a *member* of the *foundation*, the sentences might be conclusive until reversed by the visitor. If only an *independent* member, it might be defensible in those who had the management and direction of the college to put him out.

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The case was now made complete by the addition of the *order of rustication* of the prosecutor, dated *August* 21st, 1773, signed by the Master and *one* Fellow; the *sentence of expulsion*, dated *September* 27th, 1773, made by the Master and *two* Fellows, but signed only by the Master; the *order of confirmation* of the same dated *January* 13th, 1774, signed by the *Master* and *ten* Fellows. Also a copy of the statutes of the college, of which the statute *de perendinantibus* only was material, and an interpretation of the words, "*Major pars sociorum*," which occurred frequently in the statutes, and which, by such interpretation, was construed to mean the *major part* of the Fellows *resident* in college. The statute *de perendinantibus* was as follows: "Statuimus quod
" nullus ad *perendinandum* in hoc collegio admittatur, nisi de
" expresso consensu presidentis, et *majoris partis sociorum*; quibus
" constet de ipsius bonâ famâ conversationeque laudabili, et
" quem crediderint quiete victurum inter socios. Et si opposi-
" tum constiterit post ejus ingressum, primò admoneatur per pre-
" sidentem vel ejus vicegerentem; et si tunc non emendatur, mo-
" neatur secundo per duos socios tunc domi presentes; quod si
" adhuc non se reformaverit, tertio per presidentem et *majorem*
" *partem sociorum* expellatur a collegio in perpetuum. Quod si
" quisque perendinantium aliquod crimen committat unde scan-
" dalum aut infamia eidem collegio oriatur idem ab hoc collegio
" protinus expellatur."

Mr. Jones for the prosecutor proposed to maintain, 1st, That the sentence of expulsion was examinable in this court. 2^{dly}, That it was irregular, and consequently illegal.

Upon the *first* point: Colleges are societies instituted, not merely for the purpose of disturbing the founder's property, but, like all other corporations they have, for their object, the public utility. They may then be considered in two different capacities: 1. corporate; 2. eleemosynary. In each of these characters, they are subject to a different jurisdiction. In matters which concern their public, their corporate character, they are contrrollable like every other

other corporate body, by the general law of this country: In matters which regard their private or eleemosynary character, their proceedings are examinable by persons appointed by the founder, their respective visitors.

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These institutions are in general composed, not only of members who participate of the endowment, but of others who do not. The latter, however, are considered strictly as members of the college. The terms of their admission, their rank, their habits, their privileges, their discipline and regulation, the causes for the censure or expulsion of them are defined and prescribed by the statutes, which form the general constitution of the college. In virtue of this relation, they claim to be members of the University, or aggregate Corporation composed of the members of the different colleges. In this character they are subject to further regulations, and in return receive essential advantages: they become entitled to different degrees, distinctions, and valuable privileges in the learned professions, and to a qualification as electors or representatives for the University in Parliament.

There is nothing which essentially differences the particular constitution of Queen's College from that of any other. It was first founded by *Margaret of Anjou*, queen of *Hen. 6.* and afterwards further endowed by *Elizabeth*, wife to *Ed. 4.* The foundation consists of a master, 19 fellows, and 8 scholars. Mr. *Crawford* the present prosecutor, claims no part of the endowment, but was duly admitted a member of the college.

If the sentence by which Mr. *Crawford* is deprived of the rights incidental to his character as a member of the college, be not examinable in this court, he is *without remedy*. For the province of the visitor is confined to cases in which the founder's property is concerned. This was settled in *Davison's case**. It was there determined, that members of the prosecutor's description have no appeal to the visitor's jurisdiction. But it is sufficient that the proceeding is without redress in any other jurisdiction, to render it amenable to this court, which ever interposes to prevent a defect of justice to the subject. This principle is declared in the Great Charter, and expressly recognized in *Bagg's case*, 11 Co. 98. It was there resolved, "that to this court of King's Bench belongs not only authority to correct errors in judicial proceedings, but errors and misdemeanors likewise extrajudicial, tending to the breach and oppression of the subject, or to raising any faction or debate, or any manner of misgovernment;

* In Canc.
25th July,
1772.

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"vernment; in order that no manner of wrong or injury, public
"or private, may be done, but may be remedied by due course of
"law."

This is the case of a corporation, instituted for the improvement of the public manners, by the instruction of youth, and the advancement of useful learning, exercising powers which are an emanation from this court. In this view it is clearly subject to the authority of this court, which is not only invested with a controlling power over all corporations, but is also the national *custos morum*, the superintending guardian of the public morals.

This court will, therefore, not consider itself as precluded from an examination of this sentence, and a declaration that it is irregular, if it should be so found, which is all that the present case demands. For the question in the present proceeding is simply, Whether the sentence be really a regular sentence of expulsion? If it is not, the defendants are guilty; if it is, they must be acquitted.

Second point. The sentence is clearly irregular. The statute *de perendinantibus*, which provides for the regulation of those members of the college who are *independant* of the endowment, directs the mode of their admission to, and expulsion from the college. For a very obvious reason, the same description and number of persons, which is requisite to their admission, is made necessary for their expulsion; the Master and the *major part* of the Fellows. Now this sentence of expulsion is only by the Master and *one* Fellow; the second sentence, indeed, is by a Master and *two* Fellows, which evidently, however, do not constitute a majority.

Mr. Pemberton, *contra*, for the defendant. *1st Point.* It is a general rule of law, that a sentence or judgment of any court or authority, having competent jurisdiction, is conclusive until reversed. *Carth.* 225. *Buller's Ni. Pri.* 244. *1 Salk.* 290. *Blackham's case.* The propriety, therefore, of this sentence of expulsion, could not be enquired into collaterally at *nisi prius* upon this indictment.

2d Point. The sentence is a good and valid sentence. As to the statute *de perendinantibus*, a *fellow commoner* cannot be considered as a *perendinans*. But supposing he could, the interpretation of the statutes is given to the President and the major part of the Fellows: and the interpretation they have given to the term *major part*, is, that it means the majority of the Fellows *present* in college. Therefore this sentence though signed by the

the Master and one Fellow only, being the only Fellow in college, is strictly regular and legal.

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Cur. advisare vult.

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Afterwards, on *Monday June* the 26th, Lord Mansfield delivered the opinion of the court. His Lordship stated the case at large, and proceeded thus:

The prosecutor, after these proceedings, continued by force, and in despite of the college, until *July*, when the fact for which the indictment is brought happened. But he had never before made any complaint about the proceedings, nor appealed to the visitor. The question upon these facts is, Whether, after the proceedings so had against him, he had a right to continue in the college? It has been argued, that he was a *mere boarder*; and if so, that he had no right to continue after the notice given him to leave the college; and we all think that he appears to be a *mere boarder*. Mr. Jones has furnished me with a case which seems decisive as to this point, and is as follows:—*Ex parte John Davison*, Esq; in Chancery at Lord Apsley's house, *July* 25th, 1772. Mr. John Davison was admitted a *commoner* of University college in *Oxford*, and after having performed the greatest part of his public exercises, and having kept all the terms, within one, requisite for the purpose of taking the degree of Bachelor of Arts, he was expelled the said college.

Davison's
case

Commoner of
University
College in
Oxford is a
mere board-
er.

He preferred his petition to the Lord Chancellor as visitor; University college being of royal foundation, and the petition states—That University College was a foundation of King *Alfred*, anno, 872.—That by *charter*, the said college doth now consist of a *master*, 12 *fellows*, and *other* members.—That he was admitted according to the tenor of the charter; that he was expelled by the master and *five* fellows, which does not constitute one half of the fellows of the college.—The appellant, therefore, prayed, that the matter might be taken into consideration; that the master and fellows might be ordered to attend; and that the charters, books, and statutes might be inspected and produced at the hearing of the petition; and, in general, that the appellant might be redressed.

Petition.

Prayer.

The Lord Chancellor ordered, that the parties should attend, and that the public books, &c. &c. should be inspected. Upon this, the college presented a counter-petition, suggesting, that certain allegations in the appellant's petition are unsupported by evidence, particularly these:—"That the college now consists by *charter*, of a master, 12 fellows, and other members:—That

Order 15th
April, 1772.

Cross-peti-
tion.

" your

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Prayer.

Order April
30th.

" your petitioner was admitted a member pursuant to the charter." Whereas they shew, that the college is a corporation by prescription, though confirmed by several royal charters. That it is an *eleemosynary corporation*, and consists *only* of a *master* and 12 *fellows*: that they are advised, and do submit that *commoners*, *i. e.* such as pay for their lodging and diet, and are independant, *do not belong to the college*, nor are of the foundation: that they are, of course, not entitled to the protection of the visitor, and can have no title to the production of the college papers. They therefore pray, that they may be heard against the petition of the said *Davison*; and that so much of the above order as relates to the inspection and production of the college books, &c. &c. may be suspended, till it be determined " whether this be matter of " *visitatorial cognizance*?"

The Lord Chancellor accordingly suspended that part of the order.—The master afterwards made an affidavit, that the college was *merely eleemosynary*; that it had undergone various changes, till at last, *Queen Elizabeth*, in the 15th year of her reign, incorporated it " *per nomen magistri et sociorum collegii magnæ aulæ universitat. Oxon:*" that in the said grant there is *no mention* of any *commoners*, or other persons independant of the foundation, and that Mr. *Davison* never was a member of the society, never belonged to the foundation in any sense. The question was, " Whether in a college *Independants* of the foundation " were of *visitatorial jurisdiction*?"

On the part of the college it was argued, that the visitor's jurisdiction is confined to the foundation, and is derived solely from the intention of the founder with respect to the distribution of his property. That independant members are pupils received into the college by the Master and Fellows, and submitted to their discretionary government; they are strangers to the foundation. They, therefore, have no other remedy in case of particular grievance, than that which the laws of the land afford them, they have no appeal in the visitor's jurisdiction. The visitor cannot give costs, and young men of fortune may ruin, or at least harass the university by continual vexation.

On the part of the appellant it was insisted, that the visitor's jurisdiction is not confined to the foundation, but comprises the whole government of the college: that the independant members, though strangers to the eleemosynary constitution are not strangers to the college, being recognized, described, and defined in the constitution of the university. For by the university statutes,

tutes, a degree cannot be taken by a person not a member of a college. That the same statutes enact the duties, privileges, ranks and habits of independent members, according to their several orders. That these descriptions and definitions are acknowledged by those laws which affirm the constitution of the university. That those laws will imply, on the part of members admitted *intra mœnia adis*, submission to the orders and statutes of the society, and on the part of the college, protection and redress. The relation, therefore, of these independent members to the college being legally recognized, definite, and certain, they have an appeal to the visitor.—The Lord Chancellor, with the advice of *De Gray*, Lord Chief Justice of the Common Pleas, and Mr. Baron *Adams*, dismissed Mr. *Davison's* petition. And upon examination of the original order, it does not appear that any mention is made of the petitioner having liberty to inspect the books and charters, &c. of the college, in order to the discovery of any corporate right he might have.

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REX
versus
GRUNDON.

Petition dismissed.

Now the order in that case is expressly founded upon the ground of the appellant being an independent member and a mere stranger. Here the prosecutor is an independent member; and if so, the authority I have just mentioned puts an end to the question: Because, as a *mere boarder*, he had no right to continue in the college after they had given him notice to quit. It may be said there is a difference between that case and this, because the statutes of University College take no notice at all of independent members or strangers; whereas there are express provisions and regulations in the statutes of Queen's College concerning them. But supposing Mr. *Crawford* were subject to the rules and orders of the college; in that case it is insisted that the sentence of expulsion is illegal: And at the trial, the statutes of the college were offered in evidence to shew that it should have been signed by the master and a *majority* of the fellows, whereas it was signed by the master and *one* fellow only. The answer to it is, that even if the allegation were well founded, the merits, the justice, or the regularity of the expulsion cannot be entered into at the assizes; but the proper mode of impeaching it, is by appeal to the visitor. Mr. Justice *Willes* was of that opinion at the trial: but reserved the question, Whether the statutes were to be admitted in evidence to impeach the sentence, and enter into the validity of it there. And we are all of opinion with Mr. Justice *Willes*, that they could not. So that even if Mr. *Crawford* was a member, and subject to the jurisdiction, rules and orders

1775.

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versus
GRANDON.

of the college, his mode of redress is by appeal to the visitor, and not to this court.

The king's courts, if the college do not exceed their jurisdiction, have no cognizance, no superintendence. But the visitor is the only person to be applied to, and moreover his judgment is final. He does not proceed by the rules and forms of the common law; but he suffers a party *allegare non allegata, et probare non probata*; and decides entirely upon the merits. Therefore this expulsion by the Master and resident Fellows must be taken by every body to be a right sentence till avoided or set aside by the visitor who is the sole judge. So with respect to sentences of the ecclesiastical court; the temporal courts must consider them as final and conclusive until reversed.

So in cases within the jurisdiction of the Admiralty courts, their judgment is conclusive until reversed.

In this case expulsion is a matter entirely of their own jurisdiction. The visitor might have proceeded upon the contempt and misbehaviour subsequent to the original offence. There is an end of all discipline, if this expulsion might be overturned by force and violence without taking the proper course of applying to the visitor. Therefore we are all most clearly and strongly of opinion, that Mr. Justice *Willes* did extremely right, in refusing to admit any part of the statutes to be read in evidence at the trial.

It is suggested to me, that if this were a common law right, like Doctor *Bentley's* to a degree, it must be submitted to until a proper application were made to a court of justice in a legal way. It cannot be overturned by force and violence. Therefore let there be,

Judgment for the defendant.

Friday,
June 23d.

ENGLISH *qui tam versus Cox.*

MR. BULLER moved, that the proceedings in this case, which was an action on the statute of usury, might be stayed, until the costs taxed on a *nonpros* in the cause wherein *Samuel Chadwick* was plaintiff, and the said *William Cox* defendant (being 20 l.); were paid.

ASTON Justice. Though the court may, perhaps, in some cases, have been off their guard, and may have granted a motion of this kind, it has always been refused, on consideration; and the reason

son is, that the party is at liberty, if he pleases, to pursue the costs of the former action; and cited a case of *Waring v. Potter*, which he said was decided about a year and a half ago, in which the court denied a similar motion.

Per Cur. Take nothing by the motion.

1775.

ENGLISH
versus
COX.

REX. *versus* WILLIAM BOWER.

Friday,
June 23d.

THE defendant, who was a pawnbroker, was indicted for making, and causing to be made, one gold watch chain, weighing fifteen pennyweights and nine grains, of worse gold than it ought to be made: *to wit*, of gold no way agreeing with the standard, but being according to the rate of twelve carats, and two grains in the pound weight Troy worse than the standard: and for that, he the said *William Bower*, the said gold chain so falsely made, &c. afterwards falsely and knowingly, to one *William Black*, did *expose to sale*, and sell AS AND FOR a thing wholly made of gold, and agreeing with the said standard, in contempt, &c.

Knowingly
exposing to
sale, and
selling
wrought
gold under
the *selling*
ally, as and
for gold of
the true
standard
weight,
which is
indictable in
goldsmiths,
is a private
imposition
only in a
common per-
son.

The indictment contained a second count, which was word for word the same as the former, except that the former charged the defendant with *making and selling*, whereas the latter only charged him with *exposing to sale and selling* one other gold watch chain, &c. AS AND FOR a thing wholly made of gold agreeing with the standard. The jury found the defendant not guilty on the first count; but guilty of the premises in the second count.

Mr. *Dunning* had obtained a rule to shew cause why the judgment should not be arrested upon the ground of this not being an indictable offence, and also leave to move for a new trial, if the court should be against arresting the judgment.

Mr. *Wallace* and Mr. *Lucas* now shewed cause, and insisted that the offence as charged in the indictment was a public fraud and cheat in the course of the defendant's trade, and, therefore, indictable at common law, and cited *Tremaine's Entries*. The *Queen v. Macarty et al.* 1 Salk. 286. 6 Mod. 301. 2 Lord Raym. 1179.

Mr. *Dunning contra* contended, that at the utmost, this was no more than a mere civil wrong, and, therefore not indictable. That as to its being a cheat, the indictment contained no such charge, nor did it appear upon the evidence given at the trial,

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that the defendant knew whether the chain was of the standard weight or not. For the sale was by his servant; who, upon being asked by the plaintiff if it was real gold, answered in the affirmative that it was.

The question, therefore is, Whether this ignorant misrepresentation of the servant is such an offence as subjects the master to an indictment, and he insisted it was not.

Afterwards, on *Wednesday, June* the 25th, Lord Mansfield reported the evidence as follows: The prosecutor swore that he bought the chain at the defendant's shop, of *Thomas Jones* the defendant's servant, and asked him if it was real gold. He said it was: That he carried it to be examined, when he found it to be under the standard weight and not marked: Upon which he returned to the defendant's shop, and demanded his money back of the defendant, which the defendant refused to give him. I have taken in my note, that the defendant exposed it to sale, but have omitted the words, "*knowing, &c.*"—As to that, the knowing it to be under the standard, is an inference of law; but the selling by his servant was certainly *his* exposing it to sale.

His lordship then proceeded thus: The question is, Whether the exposing wrought gold to sale under the standard, is indictable at common law? There are two precedents in *Tremaine's* Entries; one for making, the other barely for exposing to sale. The statutes upon the subject relate only to goldsmiths.

It is certainly an imposition; but I incline to think it is one of those frauds only which a man's own common prudence ought to be sufficient to guard him against, and which, therefore, is not indictable; but the party injured is left to his civil remedy.

ASTON Justice.—I rather think this is a private cheat. It is not selling *by false measure*, it is only selling *under* the standard. Selling coals *under measure* is not an indictable offence, but selling them *by false measure* is*; and cited *Rex v. Lewis. Rex v. Wheatly. Hil. 1 Geo. 3. B. R.* Delivering sixteen gallons of beer, as and for eighteen, held only a private fraud, and not indictable†, 2 *Burr.* 1125.

* *Rex v. Driffield, Hil. 27 Geo. 2.*

† Since reported also in *Blackst. Rep.* 273.

WILLES Justice.—I am of the same opinion. The sale in this case is not a sale by false weight, or by false measure, but only of a watch chain of inferior value; and it is a favourable case; for it was the servant who sold it, and not the master, though to be sure the presumption is, at the same time, that the master knew of it. *Rex v. Wilder, Mich. 6 Geo. 1. Rex v. Wheatley, Hil. 1 Geo. 3. Rex versus Pinkney, Pasch. 6 Geo. 2.* I

think

think it is within the reasoning of those cases a private offence, and therefore not indictable.

1775.

Rule for arresting the judgment absolute.

REX
versus
BOWER.

REX versus FIELDHOUSE.

Tuesday,
June 27th.

MR. LUCAS moved, on the part of the prosecutor, to quash an indictment against the defendant, consisting of two counts; one for a riot, the other for an assault, and took this exception: that the grand jury had only found it a *true bill* as to the count for an assault, and indorsed *ignoramus* on the count for a riot; whereas they should have found the whole to have been a true bill, or have rejected the indictment *in toto*: and cited 2 Hawk. P. C. 210. *Yelv. 99, 100. Rex v. Ford.* Rule to shew cause.

Indictment
consisted
of two
counts; one
for a riot,
indorsed
by the jury
"ignora-
mus," the
other for
an assault,
returned
"billa ve-
ra," and
held good.

On Saturday July 1st, Mr. Buller shewed cause, and insisted that the doctrine as laid down in 2 Hawk. 210. did not apply to the case of different counts in the same indictment, which was the case here; but only to cases where the jury find *billa vera* and *ignoramus* upon different parts of one and the same charge. Here the charges are two distinct charges; the jury find one to be well founded, the other not, which they may well do,

Mr. Lucas, contra, contended, that the finding of the jury in this case, was clearly bad; for the words of the indorsement do not make the indictment, but only evidence the assent or dissent of the grand inquest. The bill itself is the indictment, when affirmed. But here, part only of the bill is affirmed; therefore the whole is void: and relied on the case of *Rex v. Ford, Yel. 99.* and 2 Hawk. 210, cited above.

ASTON Justice. This case certainly does not come within the doctrine of *Rex v. Ford*, and 2 Hawk. 210. That doctrine relates only to cases where the grand jury take upon themselves to find part of the same indictment to be true, and part false. In that case it is held that the whole is void; and the reason seems to be, because the jury do not affirm the fact submitted to their enquiry. But where there are two distinct counts, as in this case, the finding *billa vera*, as to one count only, and rejecting the other, leaves the indictment as to the count, which the jury affirm, just as if there had originally been only that one count. If you can take advantage of it any other way, you are at liberty to do so, but I think there is no reason to quash the indictment.

Mr. Justice Willes and Mr. Justice Ashurst concurred.

Per. Cur. Rule discharged.

1775.

Wednesday,
June 28th.REX *versus* Inhabitants of RINGWOOD.

On appeal from a poor's rate, because particular persons or particular property only is omitted in the rate; the sessions ought not to quash the whole rate, but should amend it in such particulars.

Quære, If personal property is rateable?

MR. *Mansfield* last term obtained a rule to shew cause why an order of sessions, quashing a rate made for the relief of the poor of the parish of *Ringwood*, in the county of *Southampton*, should not be quashed, and why the said rate should not be confirmed.

The order of sessions was made upon the appeal of *John Short*, one of the inhabitants. It was stated on the sessions's order, that it appeared to them, that *John Newman*, *Stephen Junks*, and *Timothy Swetland* were possessed as copartners of *stock* in the trade and business of *common brewers* and *malsters* in the said parish of *Ringwood*, to the value of 4000*l.* For no part of which the said copartners, or either of them, were, or was in the said rate assessed to the relief of the poor of the said parish.—That the said *John Newman*, *Stephen Junks*, and *Timothy Swetland*, were all, at the time of making the said rate, and still are *inhabitants* of the said parish of *Ringwood*.—And it doth not appear to this court, that *stock in trade* hath ever before been rated in the said parish.—Therefore, this court is of opinion, and doth adjudge that the said recited rate ought to be quashed, and the same is hereby quashed accordingly. And this court doth hereby order a *new* rate to be made immediately for the relief of the poor of the said parish, by the church-wardens and overseers of the poor of the said parish of *Ringwood*.

Mr. Dunning and *Mr. Burrough* shewed cause.—The question is, Whether *personal* property is, or is not rateable by the stat. 43 *El. c. 2.*? That it is, is manifest from the words, “*by taxation of every inhabitant, parson, vicar, and other;*” for if they were rateable only in respect of their *land*, the subsequent words “*every occupier of lands, houses,*” &c. would be tautology and superfluous. *Dalton's Justice*, edit. 1715. c. 73. tit. *Poor. Resol.* to the 18th question. This resolution is recognized in 2 *Bulstr.* 354. *Sir Anthony Earby's* case, at *Lincoln* assizes, 11 *Mar.* 1633. 9 *Car. 1.* “It was ordered and settled by the judges of assize, *Hutton*, and *Croke*, that assessments for the relief of the poor, ought to be made in an equal manner upon the inhabitants, according to their visible estates, which they had and enjoyed real and *personal*, in the place where they dwelt; and that it had been so decided by the judges of England.” In Lord

Raym.

Raym. 1280. *Rex v. Inhabitants of Barking*, all four judges agreed and resolved, that a *tradesman's* stock in trade was rateable to the poor rate, though they differed whether the stock of a *farmer* was so or not.—In *Rex v. Guardians of the Poor of Canterbury*, *Hil. 9 Geo. B.R.* *Rex v. Whitney*, *P. 10 Geo. 3. R.B.* and in a case from *Warwickshire*, in all of which this question came before the court, the court avoided saying that personal property was not rateable, and gave judgment on other sufficient grounds which occurred.

Mr. Wallace, *Mr. Mansfield*, and *Mr. Kerby contra.*—The order of sessions ought to be quashed, 1st, Because the justices have done wrong in quashing the whole rate, whereas they might and ought to have amended it under *stat. 17 Geo. 2. c. 3.* and so it was determined in *Rex v. Inhabitants of Whitney*. 2ndly, The order of sessions has rated the *whole* stock in trade of the appellants below, who are brewers, without making any *allowance* for their debts; whereas personal property, if rateable at all, ought to be rated after all proper deductions; otherwise, the debts may exceed the value of the stock; and in fact in this case, most of the articles of the trader's stock, as malt and hops have been already taxed where they grew.

As to the authorities, *Sir Anthony Earby's* case, 2 *Bulstr.* 354. is inapplicable to the present case. The only question there was, whether he was rateable in respect of *land* out of the parish: there was no question about personal property.—The case in *Lord Raym.* 1281. related to stock upon a farm.

ASTON, Justice.—The question was, Whether he was rateable for his hay and corn, which had paid before? It has never been decided that stock in trade is not rateable. *Sir Joseph Yates*, in *Rex v. Guardians of the Poor of Canterbury*, did say something like it, in the absence of my Lord Chief Justice: but then it was said, that if it was rateable, it must be a clear residue that is rated after all proper allowances and deductions.

Mr. Wallace, &c. As to the word "Inhabitants" in *stat. 43 El. c. 2.* upon which the argument has chiefly rested, it was used only to distinguish persons resident in, and occupying lands and houses within the parish, from those who occupied lands, &c. but did not reside in the parish. This interpretation is warranted by many authorities. In 5 *Co.* 67, *Jefferrey's* case, the court held he was rateable to the church as an inhabitant of the parish in respect of lands which he occupied therein, though he resided elsewhere. 2 *Inst.* 702. *Lord Coke's* reading upon the *stat. 22 Hen. 8.*

1775.

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of
RINGWOOD.

c. 5. for the repair of bridges. And so in respect of the burthens imposed by the statutes of hue and cry, and for the repair of county gaols; all persons occupying lands or houses within the hundred or county, are held to be inhabitants, and liable to contribute, though they reside out of it.

Lord MANSFIELD.—The court are not obliged to give an opinion upon every general question, which the sessions may think fit to bring before it. In general, I believe, neither here nor in any other part of the kingdom, is personal property taxed to the poor. But as to this particular case, I have no doubt what is to be done with it, as the authority of the *King* and the *Inhabitants of Whitney* is precisely in point. I think the justices would not have done very wrong, if they had acquiesced in the practice which has obtained ever since the *stat. 43 Eliz.* of not rating this species of property. The case of the *King* and the *Inhabitants of Whitney*, was determined upon this single ground; that the justices in sessions should not have quashed the whole rate, (which in cases where it is not absolutely necessary they are forbid to do by *stat. 17 Geo. 2. c. 3. sect. 6.*) but should have amended it, by inserting the particular persons, and that property which was omitted, and which they thought rateable. So here, the justices at sessions should have amended the rate, if they thought this property rateable; and then on attempting to do it, they would have discovered the wisdom of conforming to the practice, which they expressly state in the case, of not rating it. If they had tried to have amended it, how would they have rated this stock? Are the hops, and the malt, and the boiler to be rated at so much for each? Or, is the trader to be rated for the gross sum which his whole stock would sell for? If the justices had considered, they would have found out the sense of not rating it at all; especially when it appears that mankind has, as it were, with one universal consent, refrained from rating it; the difficulties attending it are too great, and so the justices would have found them. As to the authorities which have been cited, they are very loose indeed; and even if they were less so, one would not pay them much deference, especially as they differ; and the rules they lay down have not been carried into execution for upwards of 100 years. They talk of *visible* property; what is *visible* property? I confess I do not know what is meant by visible property. If every visible thing should be determined to come under that description, in that case a lease for years, a watch in a man's pocket would be rateable. Visible property is something local in the place where a
man

man inhabits. But that does not decide what a man's personal property is. Consider how many tradesmen depend upon *ostensible* property only.

As to the case in Lord *Raym.* 1280, the *only* question submitted to the court was, Whether the stock of a *farmer* was rateable to the poor? and they held it was not. But according to the report, they go on and say, the *stock* of an *artificer* is rateable: They had no case before them as to that point, therefore, the judgment upon that question is extrajudicial. But supposing it were not, what do they mean by the visible stock of an artificer? Some artificers have a considerable stock in trade; some have only a little; others none at all. Shall the tools of a carpenter be called his stock in trade, and as such be rated? A taylor has no stock in trade, a butcher has none; a shoemaker has a great deal. Shall the taylor, whose profit is considerably greater than that of the shoemaker, be untaxed, and the shoemaker taxed?—Under the land tax act in *London*, to avoid inconveniences they tax the *house* in which a person lives at a certain sum, by guess: and to avoid discovering a man's stock they tax it at random. Inasmuch that I have known a house occupied by a physician, taxed the same as when a merchant had it. But what I ground my opinion on in the present case is, that it is exactly like the case of *Rex v. The Inhabitants of Whitney*, where the court quashed the order of sessions, because they had quashed the whole rate instead of amending it: and, therefore, I am clearly of opinion, that the rule for quashing the order of sessions should be made absolute.

ASTON, Justice.—There has been no decision that personal property is rateable: all the opinions upon the subject are only *dicta* of judges. Lord *Hale* says, the *usage* has been *against* rating personal property, and that the inconveniences attending it would be very great. In *Ringwood* it never has been rated. The three cases that have been relied on are very loose. But this case is just like the *Whitney* case. There the justices quashed the whole rate instead of amending it. So the justices have done here. If they had amended it as they ought to have done, they would in the attempt to make a better rate have found the difficulty of rating personal property.

Mr. Justice *Willes* and Mr. Justice *Ashburst* were of the same opinion.

Per Cur.

Order of Sessions quashed.

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Monday,
July 3d.CATON *versus* BURTON.

Prohibition
denied,
where the
matter of
suggestion
is *dehors* the
proceed-
ings; unless
verified
by affidavit.

MR. Buller had obtained a rule to shew cause, why a prohibition should not go to the Admiralty Court, in a suit for an assault upon the high seas, upon a suggestion, that the cause of action arose, if any where, in the body of a county, *viz.* at *Dover* in the county of *Kent*, and not on the high seas; upon the authority of a case in *Moore*, 891. which was a libel in nature of a detinue at common law, for a ship lying at anchor at *Limehouse*; and because *Limehouse* was *infra corpus comitat.* a prohibition was granted.

Mr. Mansfield now shewed cause and insisted, 1st. That as the defendant had pleaded to the merits in the Admiralty Court, a prohibition ought not to go, because the want of jurisdiction alleged by the suggestion, did not appear upon the face of the libel; and so it was expressly held in 2 *Brownl.* 30, *Jennins v. Audley*. 2dly. That there ought to have been an affidavit verifying the truth of the suggestion; whereas, it was only sworn by a clerk, who had merely copied the proceedings, that he believed the suggestions were true. 1 *P. Wms.* 476. 2 *Salk.* 549.

Mr. Wallace and Mr. Buller, *contra*, contended, that there was no need of an affidavit, verifying the suggestion in this case; because it was not inconsistent with the negative plea below to the assault; and that the defendant's plea to the merits could make no difference; because a party cannot by his own consent give a court a jurisdiction which has it not: but even if the defendant had pleaded the matter in the suggestion, to the jurisdiction of the Court of Admiralty, that court could not have been permitted to try it.

ASTON, Justice, mentioned the case of *Theyer v. Eastwick*, Hil. 7 Geo. 3.* which was a prohibition to the Consistory Court of London, in a suit of defamation for calling the plaintiff a whore in London, upon a suggestion, that it was punishable at common law by the custom of London. And the court held an affidavit of the custom was necessary. He mentioned also the cases of *Hynes v. Thomson*, Mich. 1738, 12 Geo. 2. B. R. *Driver et Uxor v. Colgate*, Hil. 1738, 12 Geo. 2. in B. R. and *Buggin v. Bennet*, Pach. 7 Geo. 3. B. R. † in which latter case, he said, the three former were alluded to, and relied on by the court in their judgment.

* 4 Bur.
2032.

† 4 Bur.
2035.

Lord MANSFIELD.—The reason in those cases is decisive, namely, that the party shall not stop the proceedings of a Court of Justice, upon a mere suggestion without an affidavit.

Per Cur. Prohibition denied.

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REX *versus* MARGARET CAROLINE RUDD, widow.

Monday,
July 3d.

UPON a *Habeas Corpus*, directed to the keeper of *Newgate*, he made the following return;

1st. A commitment of the defendant by an order made at the *Justice Hall*, in the *Old Bailey*, on the first of *June 1775*; for that it appears to them, upon the testimony of *Robert Drummond* and *Henry Drummond*, Esqrs. who were examined as witnesses on the trial of *Robert Perreau*, on an indictment for felony and forgery; "That she did feloniously and falsely, make, "forge, and counterfeit a certain paper writing, purporting to "be the bond of *William Adair*, Esq. for the payment of the "sum of 7500*l.* with intention to defraud the said *William Adair*, against the form of the statute in such case made and "provided:" Wherefore they order her to be committed to the custody of the keeper of *Newgate*, to answer all such matters and things, as on his Majesty's behalf shall be objected against her, touching the said felony and forgery; there to remain in safe custody until she shall be discharged by due course of law.

2dly. A detainer by virtue of another order made at a further adjournment of the same session of gaol delivery of *Newgate*, on the 7th of *June 1775*; she being then at the bar of the said Court, and charged upon the oath of *Sir Thomas Frankland*, Baronet, with having feloniously and falsely, made, forged, and counterfeited two certain paper writings, purporting to be the bonds of *William Adair*, Esq. one for the payment of the sum of 6000*l.* and the other for the payment of the sum of 5300*l.* with intention to defraud the said *Sir Thomas Frankland*, Baronet, against the form of the statute, in such cases made and provided; to remain in *Newgate* until the next delivery of the King's gaol in *Newgate*, to be holden for the said county of *Middlesex*, to answer all such matters and things as shall be objected against her on his Majesty's behalf, touching the said felonies and forgeries; and until she shall be discharged by due course of law.

Upon this return being read, Mr. *Davenport* moved to bail the defendant, relying chiefly on the circumstance of her having been

An accomplice, who in a case out of the statutes, is under the practice allowed, admitted by the justices of peace, as a witness, and is afterwards prosecuted; has only a claim to the mercy of the crown, founded on an express or implied promise of the magistrate, on a condition performed: and it depends on his conduct in fully and fairly disclosing the joint guilt of himself and his companions whether the court will admit him to bail, that he may apply for a pardon.

1775. been admitted, and even examined as a king's evidence against the *Perreaus*.

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Mr. *Wallace*, on the part of the prosecutor opposed it: When the Court adjourned the consideration of it till the next morning.

The next day the return was read again; the keeper of *Newgate* having received a fresh warrant of detainer against her, viz. A detainer in his custody, by virtue of a warrant under the hand and seal of *Sampson Wright*, Esq. a justice of peace for *Middlesex*, she being charged before him, upon the oath of *Henrietta Alice Perreau*, for feloniously uttering and publishing as true, well knowing the same to be false, forged, and counterfeited, a certain bond for the payment of 5300*l.* payable to *Robert Perreau*, signed *William Adair*, witnesses, *Arthur Jones* and *Thomas Sturt*, with intention to defraud the said *William Adair*, against the statute, &c. and her safely to keep in his said custody until she should be discharged by due course of law. Dated the 3d of *July* 1775.

On the part of the defendant, an affidavit from three justices (Sir *John Fielding*, *Sampson Wright*, and *William Addington*, Esqrs.) was produced, in which it was sworn, that they admitted her as a general witness for the crown, as to all the forgeries: That upon her own confession she acknowledged herself a *particeps criminis* in the forgery of the bond of 7500*l.* but denied having any knowledge of or concern in any of the other bonds.

Mr. *Wallace*, Mr. *Lucas*, and Mr. *Howorth*, who shewed cause against admitting her to bail, objected, that the justices had no power to admit an accomplice in forgery as a witness, under the stat. 10 and 11 *Wil. III. c. 23.* or 5 *Ann. c. 31.* forgery not being one of the offences enumerated in those statutes. 2dly, Supposing forgery were an offence within those statutes, the confession of the defendant went no further than the bond for 7500*l.* and was silent as to the other two: Therefore, not having complied with the condition which the statute imposes, of making a full disclosure and discovery of all she knew, she was not entitled to any favour or protection in respect of the other two bonds.

Mr. *Davenport contra* for the defendant. Whether the justices have or have not strictly pursued the provisions of the different acts of parliament in this case, is not so much the question upon the application now before the court, as whether the defendant

defendant has or has not, under the faith and confidence she reposed in them, taking it for granted they were perfectly acquainted with the duty of their office, made such a disclosure and discovery of every thing she knows relative to the crimes with which she is charged, as led them to admit her a King's evidence, and taught her to believe she would be entitled to the privilege and protection which the law holds forth to all persons in her situation. Most undoubtedly she would have been totally silent upon the subject, if the hope and expectation, and even promise of a pardon had not been held out as an inducement to her to make the confession she has made. Therefore, to deprive her of the means of obtaining that pardon, is to have deceived, and drawn her in, under the colour and pretence of a judicial authority and power of protection, to disclose what she was not bound to discover, and to make her the deluded instrument of her own conviction. However irregular, therefore, the proceedings of the justices may have been, the court will not countenance the objections made to the present application, which are founded in nothing less than a breach of public faith. He also urged the circumstances of the defendant's health, being such as might, in all probability, be endangered by the confinement, if she was to be remanded.

LORD MANSFIELD.—It appears by the return to this writ, that the prisoner is detained in custody, by two orders of the court of sessions and gaol delivery at the *Old Bailey*, for the forgery of two several bonds. It appears also, that she is further detained by a warrant from a justice of peace for uttering one of these bonds knowing it to be forged: Therefore, though this court has undoubtedly a discretionary power to bail in *all cases whatsoever*, yet as the sessions are so near, and the offence committed by the prisoner of such a magnitude as that of repeated forgery, there is no colour for the present application upon the ground of that general discretion. As to the next allegation, that her state of health is such as to be endangered by the confinement, it is not of *itself* a sufficient circumstance, in such a case, to induce the court to interpose in her behalf.

A third ground which has been urged in support of the present application is this: That the prisoner has been drawn in by promises and assurances, to answer to an examination, and to swear to it on oath, which she would not have done, but from a confidence, that those promises and assurances would have been kept and performed.

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The instance has frequently happened, of persons having made confessions under threats or promises: The consequence as frequently has been, that such examinations and confessions have not been made use of against them on their trial. But it has been urged, that the prisoner in this case, is an *accomplice* who has been admitted to give evidence; that she has already given evidence, and is further ready to give evidence to convict her partners in the business; and therefore, that she is entitled by law to the King's pardon, and to a pardon which would operate in bar of her own crime. If she had such a right, we should be bound *ex debito justitiæ* to bail her. If she had not such legal right, but yet came under circumstances sufficient to warrant the court in saying, that she had a title of recommendation to the king for a pardon, we should bail her for the purpose of giving her an opportunity of applying for such pardon.

There are *three* ways in law and practice, which give accomplices a right to a pardon; and there is *one* mode, which entitles them to a recommendation to the king's mercy.

The three legal ways are *first*, in the case of *approvement*, which still remains a part of the common law, though, by long discontinuance, the practice of admitting persons to be approvers is now grown into disuse. *Secondly*, the case of persons who come within the statutes 10 and 11 of Will. 3. c. 23. sect. 5. and 5 Ann. c. 31. sect. 4. And *thirdly*, the case of persons to whom the king has, by special proclamation in the Gazette or otherwise, promised his pardon.

Approvers have a right to a pardon, persons within the statutes of William and Anne, have a right to a pardon, and the other class of offenders who come in under the royal faith and promise, have a right to a pardon; and in all these cases the court will bail them, in order to give them an opportunity of applying for a pardon.

There is besides a *practice*, which indeed does not give a legal right; and that is, where accomplices having made a full and fair confession of the whole truth, are in consequence thereof admitted evidence for the crown, and that evidence is afterwards made use of to convict the other offenders. If in that case they act fairly and openly, and discover the whole truth, though they are not entitled *of right* to a pardon, yet the *usage*, the lenity, and the practice of the court is, to stop the prosecution against them, and they have an equitable title to a recommendation for the king's mercy.

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The statutes of *William* and *Anne* are to be laid out of this case, 1st, because they are confined to the discovery of particular offences only, of which forgery is not one; secondly, because they relate only to persons who are at large; besides which, to entitle themselves to a pardon, they must actually *convict* two offenders at least. For if their confession be such on their trial, as the jury gives no credit to, they are liable to prosecution. These statutes are therefore quite foreign to the present case, as are likewise all promises of pardon from the crown by proclamation.

There remains, therefore, only the equitable practice which gives a title to recommendation to the mercy of the crown.

The law of approvement (in analogy to which this other practice has been adopted, and so modelled as to be received with more latitude,) is still in force, and is very material.

A person desiring to be an approver, must be one *indicted* of the offence, and *in custody* on that indictment: He must confess himself guilty of the offence, and *desire* to accuse his accomplices: He must likewise upon oath discover, not only the particular offence for which he is indicted; but *all treasons* and *felonies* which he *knows of*; and after all this, it is in the discretion of the court, whether they will assign him a coroner, and admit him to be an approver or not: For if, on his confession it appears, that he is a *principal*, and tempted the others, the court may refuse and reject him as an approver. When he is admitted as such, it must appear that what he has discovered is true; and that he has discovered the *whole truth*. For this purpose, the coroner puts his appeal into form; and when the prisoner returns into court, he must repeat his appeal, without any help from the court, or from any by-stander. And the law is so nice, that if he *vary* in a *single circumstance*, the whole falls to the ground, and he is condemned to be hanged; if he *fail* in the colour of a *horse*, or in circumstances of time, so rigorous is the law, that he is condemned to be hanged; much more, if he fail in essentials. The same consequences follow if he does not discover the *whole truth*: And in all these cases the approver is convicted on his own confession. See this doctrine more at large in *Hale's Pleas Crown*, vol. 2. page 226 to 236. *Staunf. Pl. Crown*, lib. 2. c. 52. to c. 58. 3 *Inst.* 129.—A further rigorous circumstance is, that it is necessary to the approver's own safety, that the jury should believe him; for if the partners in his crime are not convicted, the approver himself is executed.

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Great inconvenience arose out of this practice of approvement. —No doubt, if it was not absolutely necessary for the execution of the law against notorious offenders, that accomplices should be received as witnesses, the practice is liable to many objections. And though, under this practice, they are clearly competent witnesses, their single testimony alone is seldom of sufficient weight with a jury to convict the offenders; it being so strong a temptation to a man to commit perjury, if by accusing another he can escape himself.

Let us see what has come in the room of this practice of approvement. A kind of *hope*, that accomplices, who behave fairly and disclose the whole truth, and bring others to justice, should themselves escape punishment, and be pardoned. This is in the nature of a recommendation to mercy. But no authority is given to a justice of the peace to pardon an offender, and to tell him he shall be a witness against others. The accomplice is not assured of his pardon; but gives his evidence in *vinculis*, in custody: And it depends on the title he has from his behaviour, whether he shall be pardoned or executed. A justice has no authority to select whom he pleases to pardon or prosecute, and the prosecutor himself has even a less power or rather pretence to select than the justice of peace.

It rests therefore on *usage*, and on the offender's own good behaviour, whether he shall be prosecuted or not. And if, in a proper case, an application was to be made to this court, by an accomplice to be bailed; that is, in the case of a person properly within the usage, and who has fully complied with the requisite conditions, I should have no difficulty in bailing him, in order that he might apply for the King's pardon.

I am apprized of the case of an accomplice upon a trial before Mr. *Justice Gould*, the circumstances of which were as follows: An accomplice made a fair and full discovery to the satisfaction of Mr. *Justice Gould*, who tried the other offenders. The other witnesses who were called upon the trial proved the identity of the accomplice by the description of his person, but failed as to the identity of the other offenders: And the jury, because they doubted of the guilt of the others, acquitted them. The counsel on the part of the prosecution then contendèd that the accomplice ought to be tried: but Mr. *Justice Gould*, under the circumstances of the case, was of a contrary opinion, and I think very rightly.

These being the general rules, let us see how far the present case is applicable to them, or in any degree falls within the rea-

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son of them. A bond is detected to have been forged: three persons are apprehended on suspicion; the two *Perreaus* and the prisoner. The justices by their affidavit say, they admitted the prisoner as an evidence against the *Perreaus*, and swear they considered her as an accomplice: and they say they told her, "that if she would speak the truth, and the *whole truth*, not "only in respect of the bond in question, but of *all the other* "forgeries, that then she should be *safe*; if not she would be "prosecuted:" and the truth is, that, in point of law, she was liable to be prosecuted for all.

What is the disclosure she makes? It is this: "That *Daniel Perreau* came with a knife to her throat, and threatened to kill "her if she did not forge *one* of the bonds in question: that "under the terror of death she forged it; and that *Robert Perreau* "brought the bond before ready filled up." On this information she is no accomplice; she has confessed no guilt, if the fact is true that she was under the fear of immediate death; for it is the will that constitutes a crime. She comes, therefore, in the character of a person injured, in the character of one to whom this violence has been done. Instead of being a party offending, she is a party *offended* as much as a man who has been robbed on the highway.—Further, the justices do not treat her as an accomplice; for they ought to have kept her in custody if she had been an accomplice; but they discharged her, and they did right, there being no charge against her. But still they say in their affidavit, they did consider her as an accomplice. Suppose they did really think her guilty, she is not the more or less on that account an accomplice. But what is most material is, that her information is flatly contradicted by herself; for on a voluntary confession of her own, she took the whole guilt upon herself, said that she alone forged the bond for 7,500*l.* and that *Robert Perreau* was an innocent man. If the justices had known of this confession, they could not have admitted her as an evidence: because by that confession she makes herself not only a *principal*, but the *only* person guilty.

One of the bonds for which she is now detained, is dated three months prior to the bond in which *Robert Perreau* was concerned. Of this bond she is totally silent, and denies any knowledge of the other two. Her information is therefore false, and the conditions offered to her by the justices not complied with.—I agree with Mr. *Davenport*, that if she had made a fair and full disclosure of all that she knew, and the justices had deceived her,

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under a promise or assurance or hope of pardon from them, she would be entitled to a recommendation to mercy: and in that case I should have been of opinion to bail her, though the justices had in strictness no right to make such a promise, or give her such assurance. If any evidence or confession has been extorted from her, it will be of no prejudice to her on the trial.

The three other judges concurred.

Per cur. let her be remanded.

Afterwards, at the gaol delivery held at the Old Bailey, in September 1775, before Gould and Ashburst justices, and Hotham Baron; upon the defendant being brought to the bar to plead to several indictments for forgery found against her, the same objections were made as to the propriety of putting her upon her trial; and the judges differing in opinion, it was postponed, that the opinion of all the judges might be taken. Accordingly the ensuing gaol delivery on Wednesday the 6th of December 1775, held before Aston Justice, and Burland Baron; Aston Justice, upon the defendant being brought to the bar, delivered the opinion of the judges as follows:

Margaret Caroline Rudd, at the last September session, upon your being brought to the bar, to plead to several indictments found against you for forgery, it was insisted upon by your counsel, that, in point of law, you ought not to be put upon your trial at all; as you had confessed yourself to be an accomplice before the justices of the peace for the county of Middlesex, and had been by them admitted as an evidence for the crown against your companions in guilt, Robert and Daniel Perreau. The ground of that claim was founded upon the supposed merit of the discovery you had made: that being admitted to give evidence as an accomplice, and having performed your engagement to the public, by being examined before the grand jury, and being ready to have given evidence upon the trial, if called upon, you was entitled to a pardon, or not to have been prosecuted, that you might have time to apply elsewhere: that the constant practice in regard to accomplices becoming the King's evidence, was, that they should not be prosecuted for the offence they had confessed, or such like offences: that a contrary conduct would be a breach of faith with you, and would discourage the future discovery of criminals, if after such disclosure they were nevertheless to undergo prosecutions for their offences. To this it was answered, that the discovery meant by law or practice to entitle an accomplice to favour, must be a full, ample and true discovery; and that it would

never

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never discourage the making such discoveries, if criminals offering themselves as witnesses, were made to understand, that to entitle themselves to mercy or favour, they are to make a full discovery of all the offences about which they were questioned, and of all their accomplices in guilt. And it was farther insisted, that you had not made a *fair* disclosure, at the time of your examination, of *all* you knew relative to the forgeries which had been committed and published; but that you stood charged by the grand jury with several *other* forgeries which you had *denied the knowledge of*. Upon the debate of this matter before the bench of gaol delivery, the judges present not all concurring in one opinion, and it being judged a point of great weight and importance in the criminal law, fit to be fully considered and finally settled, how far, under what circumstances, and in what manner, an accomplice received as a witness, ought to be entitled to favour and mercy; the farther consideration of the matter was then deferred, in order that the opinion of all the judges might be taken upon the point of law.

Eleven of the judges have accordingly met, the Lord Chief Justice of the *Common Pleas* being absent through indisposition; and have mutually and deliberately considered of the matter, under all the circumstances, and it falls to my share to deliver in your presence, to the public, the substance of their reasons upon the occasion, that the ground of their resolves may be rightly understood. All the judges were of opinion, that in cases not within any statute, an accomplice, who fully and truly discloses the joint guilt of himself and of his companions, and truly answers all questions that are put to him, and is admitted by justices of the peace as a witness against his companions, and who, when called upon, does give evidence accordingly, and appears under all the circumstances of the case to have acted a fair and ingenuous part, and to have made a full and true information, ought not to be prosecuted for his own guilt so disclosed by him, nor, perhaps, for any other offence of the same kind, which he may accidentally, and without any bad design, have omitted in his confession. But he cannot by law plead this in bar to any indictment against him, nor avail himself of it upon his trial; for it is merely an equitable claim to the mercy of the crown, from the magistrates express or implied promise of an indemnity, upon certain conditions that have been performed: it can only come before the court by way of application to put off the trial, in order to give the prisoner time to

In cases but of the statutes, an accomplice fully and fairly disclosing the joint guilt of himself and his companions and who is admitted a witness and does give evidence, ought not to be prosecuted for his own guilt so disclosed; nor perhaps, for any other offence accidentally omitted by him.

But if prosecuted, he cannot plead this in bar, nor avail himself of it upon his trial. But he may apply to the

court to put off the trial, that he may have time to apply for a pardon.

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apply elsewhere.—*Nine* of the eleven judges were of opinion, that *all the circumstances* relative to a prisoner's claim of indemnity, in such a case, not only may, but *ought* to be laid before the court, to enable them to exercise their discretion, whether, upon the grounds before them, the trial should be put off, and consequently have intimation given that the prisoner ought not to be prosecuted. For the *discretionary* power exercised by the *justices* of peace in admitting accomplices to be witnesses, founded in *practice only*, cannot controul the authority of the court of *gaol delivery*, and exempt at all events the accomplice from being prosecuted. Upon every motion made, upon collateral equitable grounds, the court will see and examine into the *whole truth*, and consequently ought to be informed of all the circumstances affecting the case.

The affidavit of the justices, therefore, must in this case be necessarily taken into consideration, to see upon what ground they admitted the prisoner as a witness. For if the court looked no further than the prisoner's own information in the present case, they could not have learnt from thence that she had ever been considered as an accomplice at all; and as such had been admitted as a witness against the *Perreaus* in either of the prosecutions. Upon their affidavit it appears that the public faith was not engaged but *conditionally*; and that there was an express admonition given to the prisoner, not to conceal *any part* of the truth.

The same *nine* judges also were of opinion, that if the matter stood singly upon the two informations of the prisoner compared with the indictments against her, that she ought to have been tried upon *all* or *any* of them: for from the prisoner's information she is *no accomplice*; she has not confessed herself guilty of any offence at all. By her representation the share she has had in these transactions is perfectly innocent; but she exhibits a charge against *Robert* and *Daniel Perreau*, the one soliciting her to imitate the hand of *William Adair* from a paper he produces; the other forcing her to do the act of forgery, under the threat and fear of death. Her two informations are contradictory; and every indictment that is preferred against her, proceeds upon a falsification of the account she has given; for she answers to the justices' interrogation, that *she does not know of any other forgeries*: so she does not confess, make any discovery, or become a witness concerning these offences; and if she has suppressed the truth, and not made a full and fair disclosure, she forfeits all equitable claim to favour and mercy. But if she

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has told the truth, and the whole truth, she cannot be convicted. On the other hand, taking the affidavit of the justices, and all the case into consideration, if she is guilty of the charge contained in the indictments preferred by Sir Thomas Frankland, the judges are of opinion, as her informations before the justices have no relation to these charges, they can in no light be applied to mitigate her offences.

Upon the whole, whether the prisoner is guilty or not guilty, is a fact still to be tried by a jury upon legal evidence only, without prejudice to the prisoner from any thing which has been insisted upon in point of law by her counsel to exempt her from any trial at all. For it would be hard indeed upon the subject, who has a right to advice and assistance of counsel in all matters and points of law that may arise upon his case, if the eventual decision of the court against the points of law insisted upon in his behalf, should prejudice the subsequent trial of the facts, which is ultimately to be governed by the rules of evidence, and to be decided by the verdict of the jury. I hope and trust the facts will be tried without the least attention to, or even a remembrance of, any one matter or thing whatever, which has either made its appearance in print, or been the subject of common conversation.—I shall only add, that an accomplice, who desires his trial may be put off, that he may apply for mercy under all the most regular pretensions before laid down, *confesses the guilt*. But under the circumstances of this case, if the prisoner confesses the offences charged in these indictments, she has no *promise of mercy*, and no *claim* to favour for the reasons aforesaid.

The judges, therefore, are of opinion, that the trial ought to proceed; and I have authority to say, that the Lord Chief Justice of the *Common Pleas* concurs in that opinion.

N. B. The jury brought in their verdict as follows: “not guilty, according to the evidence before us.”

HOLMAN *et al.* versus JOHNSON, *alias* NEWLAND.

Wednesday,
July 5th.

ASSUMPSIT for goods sold and delivered: Plea *non assumpsit* and verdict for the plaintiff. Upon a rule to shew cause why a new trial should not be granted, Lord Mansfield reported the case, which was shortly this: The plaintiff who was resident at, and an inhabitant of, *Dunkirk*, together with his

Action lies for goods sold abroad, which are prohibited here, if the delivery of them be

complete abroad: tho' the vendor knows they are to be run into England.

Z 3

partner,

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GUTHRIE
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partner, a native of that place, sold and delivered a quantity of tea, for the price of which the action was brought, to the order of the defendant, knowing it was intended to be smuggled by him into *England*: they had, however, no concern in the smuggling scheme itself, but merely sold this tea to him, as they would have done to any other person in the common and ordinary course of their trade.

Mr. *Mansfield*, in support of the rule, insisted, that the contract for the sale of this tea being founded upon an intention to make an illicit use of it, which intention and purpose was with the privity and knowledge of the plaintiff, he was not entitled to the assistance of the laws of this country to recover the value of it. He cited *Huberus* 2 vol. 538, 539. and *Robinson v. Bland**, to shew that the contract must be judged of by the laws of this country, and consequently that an action for the price of the tea could not be supported here.

* 2 Bur.
1077, since
also reported
in 1 Black.
Rep. 234.
256.

Mr. *Dunning*, Mr. *Davenport*, and Mr. *Buller*, *contra*, for the plaintiff, contended, that the contract being complete by the delivery of the goods at *Dunkirk*, where the plaintiff might lawfully sell, and the defendant lawfully buy, it could neither directly nor indirectly be said to be done in violation of the laws of this country; consequently it was a good and valid contract, and the plaintiff entitled to recover. It was of no moment or concern to the plaintiff what the defendant meant to do with the tea, nor had he any interest in the event. If he had, or if the contract had been that the plaintiff should deliver the tea in *England*, it would have been a different question; but there was no such undertaking on his part. They pressed the argument *ab inconvenienti*, and cited several cases. MSS. at N. Pri. before Lord *Mansfield*, sittings in *London*.—An action brought by the plaintiffs, who were lace-merchants in *Paris*, for laces (which were contraband in this country) sold and delivered to the defendant's order at *Calais*. The question made was, Whether the vendor of contraband goods at *Paris* was not bound to run the risk of their being smuggled into this country? But Lord *Mansfield* held, that as the contract on the part of the plaintiff was complete by his delivering the laces at *Calais*, he was clearly entitled to recover, and the jury found a verdict accordingly.—*Fainney v. Reynous and Richardson*, *East*. 7 Geo. 3. B. R. since reported in 4 Bur. 2,069. & 1 Black. 633. where one partner in a stock-jobbing contract lent the other 1,500*l.* to pay his moiety of the differences on the *rescouter* day; and though this was pleaded

to

to the bond, the court upon demurrer over-ruled the plea, and held the plaintiff was entitled to recover. *Bruston v. Clifford.* in *Chan.* before Lord Camden, 4th December, 1767. *Alfbrook v. Hall* in *C. B.* where money paid for the defendant for a gaming debt was held recoverable by the plaintiff.

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LORD MANSFIELD.—There can be no doubt, but that every action tried here must be tried by the law of *England*; but the law of *England* says, that in a variety of circumstances, with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern.—There are a great many cases which every country says shall be determined by the laws of foreign countries where they arise. But I do not see how the principles on which that doctrine obtains are applicable to the present case. For no country ever takes notice of the *revenue* laws of another.

The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*.

The question therefore is, Whether, in this case, the plaintiff's demand is founded upon the ground of any immoral act or contract, or upon the ground of his being guilty of any thing which is prohibited by a positive law of this country.—An immoral contract it certainly is not; for the revenue laws themselves, as well as the offences against them, are all *positivi juris*. What then is the contract of the plaintiff? It is this: being a resident and inhabitant of *Dunkirk*, together with his partner, who was born there, he sells a quantity of tea to the defendant, and delivers it at *Dun-*

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kirk to the defendant's order, to be paid for in ready money there, or by bills drawn personally upon him in *England*. This is an action brought merely for goods sold and delivered at *Dunkirk*. Where then, or in what respect is the plaintiff guilty of any crime? Is there any law of *England* transgressed by a person making a complete sale of a parcel of goods at *Dunkirk*, and giving credit for them? The contract is complete, and nothing is left to be done. The seller, indeed, knows what the buyer is going to do with the goods, but has no concern in the transaction itself. It is not a bargain to be paid in case the vendee should succeed in landing the goods; but the interest of the vendor is totally at an end, and his contract complete by the delivery of the goods at *Dunkirk*.

To what a dangerous extent would this go if it were to be held a crime. If contraband clothes are bought in *France*, and brought home hither; or if glass bought abroad, which ought to pay a great duty, is run into *England*; shall the *French* taylor or the glass-manufacturer stand to the risk or loss attending their being run into *England*? Clearly not. Debt follows the person, and may be recovered in *England*, let the contract of debt be made where it will; and the law allows a fiction for the sake of expediting the remedy. Therefore, I am clearly of opinion, that the vendors of these goods are not guilty of any offence, nor have they transgressed against the provisions of any act of parliament.

I am very glad the old books have been looked into. The doctrine *Huberus* lays down, is founded in good sense, and upon general principles of justice. I entirely agree with him. He puts the general case in question, thus: *Tit. de conflictu legum, vol. 2. pag. 539.* "In certo loco merces quædam prohibita sunt. Si vendantur ibi, contractus est nullus. Verum, si merx eadem alibi sit vendita, ubi non erat interdicta, emptor condemnabitur, quia, contractus inde ab initio validus fuit." Translated, it might be rendered thus: In *England*, tea, which has not paid duty, is prohibited; and if sold there the contract is null and void. But if sold and delivered at a place where it is not prohibited, as at *Dunkirk*, and an action is brought for the price of it in *England*, the buyer shall be condemned to pay the price; because the original contract was good and valid.—He goes on thus: "Verum si merces vendita in altero loco, ubi prohibita sunt essent tradenda, jam non fieret condemnatio, quia repugnaret hoc juri et commodo reipublicæ quæ merces prohibuit." Apply this in the same manner.—But if the goods sold were to be delivered in *England*, where they are prohibited; the contract

is void, and the buyer shall not be liable in an action for the price, because it would be an inconvenience and prejudice to the state if such an action could be maintained.

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The *gist* of the whole turns upon this; that the conclusive delivery was at *Dunkirk*. If the defendant had bespoke the tea at *Dunkirk* to be sent to *England* at a certain price; and the plaintiff had undertaken to send it into *England*, or had had any concern in the running it into *England*, he would have been an offender against the laws of this country. But upon the facts of the case, from the first to the last, he clearly has offended against no law of *England*. Therefore, let the rule for a new trial be discharged.

The three other judges concurred.

THE END OF TRINITY TERM.

MICHAELMAS TERM

16 GEORGE III. B. R. 1775.

Friday,
Nov. 10th.What is a
sufficient
description
in a com-
mon reco-
very.MASSEY *versus* RICE *et al'*.

THIS was a writ of error from a judgment on *scire facias* in the court of King's Bench in *Ireland*, brought to reverse four common recoveries in the Court of Common Pleas there; viz. two of lands in the county of *Limerick*, and two of lands in the city of *Limerick*; but the Court of King's Bench in *Ireland* affirmed them all.

This case was argued twice; first, in the last term, by Mr. *Buller* for the plaintiff, and Mr. *Alleyne* for the defendant; and again in this term, by Mr. *Wallace* for the plaintiff, and Serjeant *Walker* for the defendant.

Mr. *Buller* for the plaintiff in error objected, that the several descriptions in all the four recoveries were bad. There were fourteen parcels in each recovery, and the principal objections he made were as follow: 1st, As to the premises in the county, because some were demanded thus; "all those the *castle, town, and lands* of, &c. containing by *estimation* so many acres," without setting out the *quality* of the *lands*, as meadow, pasture, wood, and so forth; that a recovery would not lie of a *town*, and that so many acres by *estimation* were *uncertain*. Objection 2d, That others were described thus; "all that *part* of the *town and lands*, &c. now or late in the *tenure* of such and such a person," which was *vague* and *uncertain*. Objection 3d, That two parcels were described as "containing a *plough-land*," which was also *vague* and *uncertain*.

In respect of the premises in the *city*, he objected, that they were all demanded by the description of "*messuage or tenement*," which

which was uncertain, and also as being said to be "*now or late*" "in the tenure, &c." He insisted that a recovery has no effect till execution executed. 1 *Rep. Shelley's case*. Sir William Jones, 10 *Str.* 1185. Therefore the description of the premises should be so certain, that the sheriff may know how to execute it: And if bad in ejectment, a *fortiori* in a *præcipe*. *Bur.* 144. 1596. 1601.

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To shew that the *nature* and *quality* of the land ought to be set out, he cited 1 *Inst.* 4. — 11 *Co.* 25. *b.*

To shew that these descriptions would be bad in ejectment for want of setting out the *quality* of the land, he cited *Savel's case*, 11 *Co.* 55. 1 *Rol. Rep.* 55. *pl.* 29. *S. C.* *Bridgeman* 56. 1 *Salk.* 254. *Cro. Jac.* 124. *Cro. Car.* 57.

To shew that both *quantity* and *quality* should be set out, *Styles* 193. *Ley* 82. "four acres by estimation is uncertain." *Salk.* 254. 4 *Mod.* 98. *S. C.* 1 *Show.* 338. As to the uncertainty of the description, "*messuage or tenement*," he cited 3 *Wils.* 23. where judgment was arrested on this single objection. *Moor* 691. *Popham* 22. If the description in these recoveries are good, there would be no necessity for any description at all. With respect to the 2d objection, he insisted, the description was uncertain throughout. For *part of a town* might be any quantity: It might be a moiety, or more or less. So, the words "*now or late*" "*in the tenure*," are equally vague: Consequently, the sheriff, by this description, could have no means of finding out the premises. As to the word "*plough-land*," he said it was applicable to every thing that affords food for a family, and so vague, that in 1 *Inst.* 69. *a.* Lord Coke says, "a fine shall not be received *de una virgata terra* for the uncertainty." He also cited 1 *Leon.* 188. to shew that a *fine* of a *tenement* is uncertain: and submitted upon these authorities, that the descriptions were all defective. 2dly, He contended, that if only *one* description in each recovery was bad, the judgment must be reversed *in toto*, because *entire*; and therefore not to be divided: and cited *Cro. Car.* 471. *Str.* 807. *Cro. El.* 162. 1 *Leon.* 149. 1 *Rol. Abr.* 775. *pl.* 2. *Carthew* 235. 2 *Str.* 934.

LORD MANSFIELD.—There are fourteen different descriptions of lands in these common recoveries. Single out which is the strongest.

Mr. Buller instanced the following: All that messuage or "tenement, with the appurtenances, situate in the lane between "the two Abbey Gates, with its appurtenances called, &c. now

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" or late in the possession of J. C. his undertenants or assigns,
 " in the county of the city of *Limerick*."

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LORD MANSFIELD.—I remember a case in ejectment, where there was a doubt how execution should be executed; and the court directed an issue to guide the sheriff in delivering execution. *Mountain* has been held a good description of lands in *Ireland*; and it was mountain-land in a valley. *Vide 1 Str. 71.*

Mr. *Alleyne*, *contra*, said he should consider, 1st, What degree of precision is required by the *Register* to the description of lands demanded in a *precipe quod reddat*. 2^{dly}, What indulgence was to be given to a common recovery as a conveyance and common assurance. 3^{dly}, Whether from the *locality* of these particular lands the descriptions were not sufficient. 1st, It is a general rule that the form of the register must be followed, but there are cases that admit of a deviation from it. The general principle upon which all forms are founded and upheld is, that the defendant may know what he has to defend; and therefore, whenever the term used either in respect of the quantity or the quality, is sufficiently certain and notorious to answer that purpose, it will be good, though not particularly named in the register. 1 *Roll. Rep.* 165. 2^{dly}, Great favour is to be shewn to common recoveries, because they are now a species of conveyance and common assurance of land. They are not like the cases cited, most of which are cases in *ejectment*, which are *adversary* suits; and where the objections arose in consequence of some essential defect, which is fatal. But a common recovery is in the nature of an amicable suit, which admits of a greater latitude, and any description that would be good in a deed, would be good in a common recovery. 5 *Rep.* 40. *Popbam* 22. S. C. 3^{dly}, With regard to the *local* situation of these lands in *Ireland*, it has been always understood that the judges of *Ireland* know the description of lands in that country better than the judges of this court; and therefore credit ought to be given to their knowledge. It was so expressly held in *Macduncob v. Stafford*, 2 *Roll. Rep.* 166. 1 *Str.* 71. 1 *Bur.* 623—9; which last case in principle answers all the objections that have been made to-day. Another argument arises upon the statutes of *Jeofails*, which is, that being after verdict, they are now too late. As to the objections made to the particular description of these lands, 1st, The word "*town*" in *Ireland* does not mean as it does here, houses inhabited, but is merely a technical description of a particular district, and is notorious there.

2^{dly},

2dly, With respect to the uncertainty of "so many acres by estimation," it is sufficient if the general boundary be known; it is not necessary that the precise measure should be accurately and exactly ascertained; and as to the term land, in legal acceptance it always means arable. 3dly; Here the term messuage or tenement does not stand alone as in the case cited, but is accompanied with other words descriptive of its situation; such as, "the lane between the two abbey gates, &c." which render it sufficiently certain for the sheriff to deliver possession: Besides, it is the same description as is used in the deed of settlement by which the estate was entailed. Therefore even if the descriptions were more doubtful, the court will make such a construction as will support them. 2 Mod. 233.

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Upon a second argument, Serjeant *Walker* for the defendant cited, 1 *Ventris* 52. 2 *Ventris* 31. 2 *Wils.* 116: Mr. *Wallace* for the plaintiff cited *Popham* 203. *Noy* 86.

LORD MANSFIELD. — The consequences of these objections are so great; they are so void of the least glimmering of reason and common sense; and it would be attended with such vast inconveniences to the public in many cases, without a possibility of doing good in any, if in common recoveries which are a species of conveyance and common assurance, such nice exceptions were to prevail; that the strictest proof of their being founded in law is necessary, to induce the court to overturn a recovery on such grounds.

By the settled law of the land, men by deeds may fetter their estates: But tenant in tail when of age may unfetter them, observing a certain form. In this case there can be no doubt of the meaning of the tenant in tail, or of his power to unfetter this estate. The only question is, Whether he has done it agreeable to the proper form? that is, Whether he has described the premises with sufficient certainty? Now the description which he has used, is the identical description in the deed which created the fettering; and the objection which is made, is not so much that that description is uncertain, as that six or seven hundred years ago, in an *adverse* action, there was a doubt whether such an objection would not have lain: and therefore the defendant would make the same objection and raise the same doubt now. But a common recovery is not an *adverse* action.

It is said that "all that messuage or tenement with the appurtenances situate in the lane between the two abbey gates,"

"now

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"now or late in the occupation of J. C. his undertenants or assigns, in the county of the city of *Limerick*," is too vague and uncertain. But one must look with a microscopic eye to discover that a *messuage or tenement*, &c. is so uncertain a description, as that the sheriff or any other person could not know how to find the premises by it: And the objection can only be made by a person who pores over the syllables of the words.

The objections are of two sorts, and I have no doubt as to either. 1st, That the premises in the county are demanded thus: "All those the *castles, towns, and land*, containing by *estimation*, &c." which it is argued is uncertain both in respect of quality and quantity. As to that, it is admitted that "*castle*" is a good description in *England*. "*Town*" was determined to be a good description in *Cottingham v. King*. 1 *Bur.* 623. And "*land*" means *arable* land.

The next objection is, that the premises in the city are described thus; "All that *messuage or tenement*, with a garden or meadow thereto belonging, situate, &c. and now or late in the occupation of, &c. &c." which it has been contended would be a bad description in *ejectment*. There are many cases in *ejectment* which have gone very far indeed: And therefore the doctrine of those cases ought not to be extended. As to the authority in 3 *Wilf.* 23. which would have great weight on account of its being so recent, the judges in that case decided against their own private opinion and inclination, because they held themselves bound by authority. But there, the words were only "*messuage or tenement*" without any other description. Here there are other words "with the appurtenances and a garden, &c." which shew that "*messuage or tenement*" are two words for the same thing: And that both mean a dwelling-house.

But this is not my fundamental ground of determination in the present case. What I ground my opinion upon is, the principles laid down in *Dormer's case*, 5 *Co.* 40. *b.* reported also in *Popham* 23; and the distinction the court there take, between adverse actions and common recoveries; which at that time were become a common assurance and conveyance of lands, &c. and which the court say, "being also made by assent between the parties, shall, and always have had a different exposition from what is given to a recovery by *pretence* of title, or to the proceeding in any other real action to which they are not to be compared:

"Therefore

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"Therefore a common recovery may be suffered of an advowson, common in gross, warren, and the like, and the intent of the parties shall be observed." Now the objection in this case is an objection to the very same description as is used by the ancestor in the deed which created the entail. The sole object of the recovery is to unfetter the premises so entailed; and therefore I will not depart from this anciently established principle to do such cruel injustice, both against the intention of the parties, and against public convenience. Not one precedent has been cited where such an objection has been held good in the case of a common recovery. But a case of a fine has been cited where it was allowed, and from thence it has been argued by analogy, that it is bad in a common recovery; but the argument does not hold.

I agree with Mr. *Wallace* that the argument of the defendant not having made the objection in the first instance, is of no weight. But Serjeant *Walker* cited a case from 2 *Ventris* 31. which is very material; and is shortly thus: "In ejectment a special verdict found, that there was a parish of *Ribton* and a vill of *Ribton*, but the latter not co-extensive with the former; and that the tenant in tail of lands in the parish, but out of the vill, bargained and sold the lands in the parish of *Ribton*, with covenant to levy a fine and suffer a recovery to the uses of the deed: But the fine and recovery were only of the lands in *Ribton*: The question was, Whether this recovery was good for the lands in the parish of *Ribton*." It was argued "that the common law knows no such division of the kingdom, as parishes, but only the division of vills; and therefore, where a place is named in the record of the law, and no more said, it is always intended a vill: Consequently, that the recovery, if it passed any lands at all, could only pass those in the vill." But the court in favour of common recoveries held, "that this recovery should extend to the lands in the parish of *Ribton*; and the rather, because it being found by the verdict that the tenant in tail had no lands in the vill, the recovery must necessarily be void, unless it were extended to the lands in the parish." This decision is an instance of liberality that would not have been adopted or followed in an adverse *præcipe*. So in many other instances; as an *advowson*, for which no adverse action will lie, but a common recovery will. Therefore as the distinction between amicable and adverse suits exists; as the inconveniences of avoiding the recovery would

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would be great, as no precedent in point is produced, and there is no possibility of doubt about the intent of the parties, I am clearly of opinion that the judgment of *R. B.* in *Ireland* ought to be affirmed.

The three other judges concurred.

Per Cur. Judgment affirmed,

Tuesday,
Nov. 14th.

LOVEACRES ex dim. MUDGE versus BLIGHT, et Uxor.

One devises
thus: "as
" touching
" my world-
" ly estate,
" I devise
" the same
" as fol-
" lows; I
" give to
" my wife
" *E. M.* 5*l.*
" to be paid
" yearly out
" of my es-
" tate at
" *G. Item,*
" to *T. M.*
" and *E.*
" 5*l.* each,
" to be paid
" twelve
" months
" after my
" decease.
" *Item* to
" my two
" sons *T.*
" *M.* &
" *R. M.*
" whom I
" make my
" and or-
" dain my
" sole execu-
" tors, all
" my lands
" and ten-
" ements free-
" ly to be en-
" joyed and
" possessed
" alike."
T. M. and
R. M. are
tenants in
common, and
take a fee.

IN Ejectment a special case was reserved; the material facts of which were as follow: That *John Mudge* being seised in fee of the premises in question by his last will, bearing date the 5th of *August* 1741, devised as follows: "As touching such
" worldly estate, wherewith it hath pleased God to bless me in
" this life, I give, demise and dispose of the same in the follow-
" ing manner and form: First of all I give and bequeath to
" *Elizabeth Mudge* my dearly beloved wife, the sum of five
" pounds to be paid yearly out of my estate called *Gloze*, and also
" one part of the dwelling-house being the west side, with as
" much *Woodcroft* home at her, as she shall have need of, by my
" executors hereafter named. I give and bequeath unto my
" son *Thomas Mudge* the sum of five pounds, to be paid twelve
" months after my decease. I give unto my grand-daughter
" *Elizabeth* the sum of five pounds to be paid twelve months
" after my decease. *Item*, I give unto *John Mudge* and *Robert*
" *Mudge*, my two sons, whom I make my
" and ordain my sole executors of this my last will and testament,
" all and singular my lands and messuages by them freely to be
" possessed and enjoyed alike; and I do hereby utterly revoke and
" disannul all former wills and legacies and executors by me in
" any ways before named, willed and bequeathed, ratifying and
" confirming this and no other to be my last will and testament.
" In witness whereof I have hereunto set my hand and seal the
" day and year first above written, *John Mudge*.

" Before the sealing of this will, I give to my wife *Eli-
" zabeth Mudge*, all my household goods to be deli-
" vered by my executor, and after my death the said
" goods parted equally, be parted between the exe-
" cutors alike."

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That the testator died leaving three sons; *Thomas, John, and Robert*: That *Thomas*, the eldest, died, leaving the lessor of the plaintiff his eldest son; that *Robert* died soon after the testator, and *John* in *April* last, leaving issue. That the estate in question was worth 20 *l. per annum*, and the personal estate of the testator worth 60 *l.*

The question was, Whether the plaintiff is entitled to recover the premises in question?

Mr. *Wilson* for the plaintiff, stated the question to be, *what estate Robert and John Mudge took in the premises*; and insisted they took an estate for *life* only. 1st. Because there are no *technical* words of *limitation*, nor words expressive of the testator's interest in the premises: Only "*lands and messuages*." 2dly, no *circumstances* or expressions that shew an apparent *intention* in the testator to pass a *fee*. The circumstances from which it will be contended that such intention does appear, are these: First, the words "*freely to be possessed and enjoyed*;" but they may be fully satisfied by the devisees enjoying the premises for *life*: And it is enough for the plaintiff, if they do not necessarily manifest an intention to give a *fee*; which they certainly do not. 2dly, that the estate is charged with an annuity of 5 *l.* to the testator's wife: But here the annuity is a *charge* upon the *land* (let who will be in possession), not on the *persons* of the devisees; therefore not within the principle of the cases which say, that the payment of a sum of money shall give a *fee*. 3dly, The introductory words "*as touching my worldly estate*;" but these words *alone* do not import an intention to disinherit the heir at law; and therefore are not of themselves sufficient to carry a *fee*. Where the word *estate* is used throughout a will, it may be held auxiliary; but here, in the clause upon which the objection arises, the testator has studiously avoided using the word *estate*, and inserted *messuages* and *lands* in its stead. 4thly, Some argument may be attempted from the legacy given to the heir at law; but no inference arises from that circumstance, because it is made payable out of the personal estate. Therefore, upon the whole of the will, there are no circumstances which shew an apparent intention in the testator to give his younger sons a *fee*; at least the intent is ambiguous; and if so, the heir at law is entitled. But supposing they took a *fee*, the plaintiff is entitled to a moiety.

LORD MANSFIELD.—Reserve that question.

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Mr. *Kerby contra*. Upon the first question, the only matter for the consideration of the court is, Whether upon the whole of the will taken together, enough appears to shew the testator intended his younger sons should take a fee. That he did, is manifest; 1st, from the introductory words, "*as to all my worldly estate.*" And so it was held in *Forrester* 157. *Ibbetson v. Beckwith*. 1 *Wils.* 133. 3 *Wils.* 143. and in a late case **Ante*, 299. *Hogan ex dim. Wallis and others v. Jackson*. 2dly, From the annuity to his wife, which is a charge on the *person*: For the words "*by my executors*" refer to the *whole* sentence; and therefore are equivalent to a devise to his executors "*they paying*" &c. which will give a fee. 3 *Bur.* 1534. 3dly, The legacy of 5 *l.* to his eldest son, shews he did not mean him to be the object of any further bounty. 4thly. The omission after the words "*whom I make my*", may be aptly supplied by the word "*heirs*", which would put an end to the question. 5thly, The words "*freely to be enjoyed by them*," shews the testator meant to give it as fully and freely as he had enjoyed it himself. 6thly, Before the sealing his will he gives his wife the household goods, and devises them over after his death to his two younger sons.

It is clear from hence that he thought his wife would otherwise take the absolute property in them: And therefore it is a fair inference to say, that not distinguishing between real and personal estate, he thought the *whole* interest in the *real* estate passed, as the personal estate would have done, if he had not added the subsequent limitation. From all these circumstances, enough appears to shew the testator meant a fee, and therefore the plaintiff ought not to recover.—As to the second question, he insisted that the devisees were *joint tenants*; and therefore that the share of the deceased brother survived to the defendant.

Mr. *Wilson contra*, as to the second question contended, that the words "*to be enjoyed alike*" made them *tenants in common*; for the word "*alike*" is equivalent to "*equally*" which has been held to create a tenancy in common. And this was clearly the intention of the testator: For he was providing for his children; therefore it is not natural to suppose that he meant the survivors should take the whole, and so leave the family of the son who died first destitute.

Lord MANSFIELD.—The principles by which this case must be governed, are settled by analogy to established rules respecting the

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the limitation of estates by deed at common law. If a man by deed of conveyance at common law gives land to another *generally*, without words of *limitation*, the donee has only an estate for *life*. But I really believe, that almost every case determined by this rule, as applied to a devise of lands in a will, has defeated the real intention of the testator. For common people, and even others who have some knowledge of the law, do not distinguish between a bequest of personalty, and a devise of land or real estate. But, as they know when they give a man a horse, they give it him for ever; so they think if they give a house or land, it will continue to be the sole property of the person to whom they have left it. Notwithstanding this, where there are no words of limitation, the court must determine in the case of a devise affecting real estate, that the devisee has only an estate for life: Because the principle is fully settled and established, and no conjecture of a private imagination can shake a rule of law.

But as this rule of law has the effect I have just mentioned, of defeating the intention of the testator in almost every case that occurs; the court has laid hold of the generality of other expressions in a will, where any such can be found, to take the devise out of this rule. Therefore, if a man says, "I give *all my estate*," that has been construed to pass a *fee*: or even if words of locality are added, as "*all my estate in A*;" it has been held, that the whole of the testator's *interest* in such particular lands will pass, though no words of limitation are added. 2 P. Wms. 524: Because the law says, that the word "estate" comprehends not only the land or property which a man has, but also the *interest* he has in it. So in a late case from *Ireland**, the court had no difficulty in saying, that the words "*all my worldly substance*," in the introductory part of the will, meant every thing the testator had; and that the words "*all his real effects*," in the subsequent residuary devise, were equivalent to *worldly substance*, and carried every thing to the residuary devisee. In general, wherever there are words and expressions, either general or particular, or clauses in a will which the court can lay hold of, to enlarge the estate of a devisee, they will do so to *effectuate* the *intention*. But if the *intention* of the testator is *doubtful*, the rule of law must take place: So, if the court cannot find words in the will sufficient to carry a *fee*, though they should themselves be satisfied beyond the possibility of a doubt, as to what the intention of the party was, they must adhere to the rule of law.

A 2 2

Now,

* Hogan ex
dim. Wallis
versus Jack-
son, ante,
299.

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Now, though the introduction of a will, declaring that a man means to make a disposition of *all his worldly estate*, is a strong circumstance, connected with other words, to explain the testator's intention of enlarging a particular estate, or of passing a fee where he has used no words of limitation, it will not do *alone*. And all the cases cited in the argument, to shew that the introductory words in this case would *alone* be sufficient, fall short of the mark; because they contained other words clearly manifesting the intention of the testator to pass a fee.

The question is always a question of construction, and depends upon observations naturally arising out of the will itself. And therefore, if in this case there are words in the will which denote an intention in the testator to give his sons more than an estate for life, the court will give effect to that intention.—Now if a man devise lands to another, *paying thereout 100 l.** or any other gross sum, though he add no words of limitation, yet the devisee shall have a fee: because unless he were to take a fee, he cannot be sure of paying the 100 l. So if an estate be given to *A. to be sold for payment of debts and legacies †*, the purpose to be answered makes it a fee, without words of limitation. In short, wherever any thing is directed to be done, which, strictly speaking, an estate for life only may not be sufficient to answer, the court will imply a fee.

* *Wellcock*
v. Hammond.
2 *Lev.* 114.

† 1 *Chan.*
cases 296-7.

Let us examine then the observations that arise upon this will. The first material observation upon which it has been argued that the testator meant to give his younger sons a fee in this case, is, a bequest to his wife of an annuity of 5 l. *&c.* which he gives thus: "I give to my wife the sum of 5 l. to be paid yearly out of
" my estate called *Gloze*, and also one part of the dwelling-house
" with as much wood-croft home *at her*, as she shall have need of,
" by my executors hereafter named." It is clear, that in this devise, some word is misplaced or left out; and where that is the case, if it be necessary to discover the intention of the testator, the court may supply it. Now the most obvious word to be supplied here, as it strikes me, is the word "request;" *at her request*, would make the sense complete. Then, as to the devise itself, the 5 l. is directed to be paid by the executors out of the estate, and the wood is to be provided at all events; it therefore must be supposed to be brought home from off the estate. But if the executors were to take only an estate *for life*, they would not be able to pay the annuity during her life out of the profits only, or to furnish all the wood she might want; because the stock on

the estate might fall short. It is but reasonable therefore to infer, that such an interest was intended, as would enable them to comply with the testator's directions, fully and completely in every respect.

It is not an immaterial observation that has been made upon the devise over of the household goods to the executors, to be equally divided between them as the testator expresses it, "after my death," which should clearly have been "after her death."

The next observation arises upon the words "whom I make my, and ordain, &c." The word *my*, without some addition, means nothing at all. It cannot mean *executors*, because the testator has expressly inserted that word afterwards. It seems, therefore, most natural and proper to insert the word *heirs*. But I rest upon the other grounds, rather than upon the conjecture how the blanks should be filled up.

The last observation is drawn from the words "*freely to be possessed and enjoyed by them alike*." Now the word "*freely*," strikes me as a very material word: For the testator has charged the estate with the payment of the annuity to his wife, &c. so that he could not mean by the word "*freely*" to give it *free of incumbrances*. The free enjoyment, therefore, must mean, *free from all limitations*; that is, the absolute property of the estate.

Upon these observations arising on the face of the will itself, coupled with the introductory clause, I am of opinion upon the first question, that the testator's intention was to give his sons *John and Robert* a fee. If so, it is equally clear upon the second question, that this is a *tenancy in common*. The word "*alike*" is the same as the word "*equally*," and in the devise of the household goods, the testator has made use of the word *equally*. Therefore the lessor of the plaintiff is entitled to a moiety.

The three other judges concurred.

Per Cur. Judgment for the plaintiff for one moiety.

GOODWIN *versus* CROWLE, Executor.

Friday,
Nov. 17th.

ERROR from C. B. in an action of debt, to recover a penalty for the non-performance of articles of agreement, between the plaintiff and the defendant's testator.

The agreement was, that the defendant in the original action, now the plaintiff in error, should sink a pit for the testator, and

rer may be entered up for the penalty, in like manner as before the *stat. 8 & 9 Wm.* then it can stand only as a *security* for the *damages sustained*.

In debt for a penalty, for non-performance of covenants, judgment on demurrer. 3. c. 11. but

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begin to work within 14 days after the date of the agreement, and continue working and sinking the same, day and night, the six working days in the week, till it should be completed. The breach assigned was, that he did *not* begin to sink the pit in the articles mentioned *within 14 days* from the date of the said agreement, and *continue* sinking the same, &c. *prout* the articles. The defendant pleaded, that he was *ready to begin within the 14 days*; but that it was agreed between him and the testator, that *before he began to sink* the pit, he should drive or sink a slough or drain, &c. and averred that he did immediately begin to sink the said drain; but before the said drain could be sunk, 20 days had elapsed; by reason whereof he could not begin to work the pit within the 14 days. Upon demurrer to this plea, and argument thereon, the court of C. B. gave judgment for the plaintiff, which he accordingly entered up for the whole penalty 250*l.* and 23*l.* 10*s.* costs.

Mr. Buller for the plaintiff in error, objected, upon the errors assigned, 1st, That it did not appear by the record that the plaintiff had sustained any damages. 2^{dly}, That no writ of inquiry had been awarded to ascertain the damages. 3^{dly}, That the judgment ought not to have been taken for the whole penalty—but only entered up as a security.

He argued, that since the statute 8 & 9 Wm. 3. c. 11. sect. 8, the plaintiff cannot take judgment for the whole penalty, any further than as a security for the performance of the covenants; therefore the damages ought to have been ascertained by a writ of inquiry. At common law the party was at liberty to take out execution for the whole debt: This drove defendants into Chancery; where, if compensation could be made, the court would not suffer the penalty to be taken. The occasion of this statute was to moderate the rigour of the law. And since the statute, this court has the same jurisdiction as the Court of Chancery had before. In reason and conscience, the plaintiff ought not to retain the whole penalty, but only to be indemnified *quoad* what he has suffered: and cited *Drage v. Brand*, 2 Will. 377. as in point. Also a later case, *Lys v. Hutchins*, 18th June 1773, in *Cam. Scacc*; but there the court were not all of the same opinion, and it went off upon the insolvency of one of the parties. Here the plaintiff has elected to proceed under the act of parliament; for the declaration contains a *double* breach. 1st, *Not beginning* within fourteen days. 2^d, *Not continuing* to work, &c. which would not have been good at common

mon law. 1 Roll. 112. *Saunders versus Crawley*. Consequently the plaintiff is now bound to abide by the direction of the statute, and cannot take advantage of the penalty.

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Mr. *Wood* for the defendant. Two objections have been taken to the judgment. 1st, That there ought to have been a writ of inquiry before final judgment. 2dly, That the judgment ought to have been entered up only as a security. The case of *Drage versus Brand*, depended upon the first branch of the statute. The court of *C. B.* thought the plaintiff had made his election to proceed upon the statute; and, therefore, that the defendant ought to have the same advantage. There, *several* breaches were assigned; and the cause had gone down to trial, so that the same jury might have assessed the damages. But here, the plaintiff has in fact assigned only *one* breach: the covenant is one single sentence, "that he shall begin within fourteen days, and continue to work," &c.

But suppose it were necessary for the plaintiff to have set out the breaches, and have a writ of inquiry; yet the judgment is regular, and he may now do it. By the statute, it must be the same judgment as before; that is, a judgment for the penalty, and it is to stand as a security. Therefore, the form of the judgment is right.

LORD MANSFIELD.—The true construction and substantial justice of the act is, that the penalty shall not be levied in any case whatever; but the judgment in this case being upon demurrer, it must be as usual, to recover the debt. The statute directs that the judgment shall be entered as heretofore; but then it is only to stand as a security for the damages sustained. The plaintiff is not to assign the breaches till after the judgment is given.

If the plaintiff should take out execution for the whole penalty, then is the time to complain: but there is no objection to the judgment as it stands; and on that ground only the court give their opinion that the judgment must be affirmed.

Per Cur.

Judgment affirmed.

LORD MANSFIELD added, that in cases where the court of Chancery order a judgment to be given as security, it is entered up in the usual form, but the party cannot take out execution upon it for the sum in which it is given.

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Tuesday,
Nov. 21st.FREEMAN *versus* The Duke of CHANDOS *et al. et c*
contra.

A remote reversion in fee held to pass under general words in an act of parliament, by way of settlement in execution of articles, tho' the reversion was not particularly in contemplation at that time; the general words being sufficient to carry it; and the intention of the parties being to include all the estate of the settlor.

THIS was a case out of Chancery for the opinion of this court, the material facts of which were as follow:

Mr. *Francis Keck* being seised in fee of the reversion of the estate in question, by his will, bearing date the 29th of June 1728, devised the same to his son *John*, and the heirs of his body; with remainder to his only daughter *Mary*, and the heirs of her body; with remainder to his six grand nephews, *Ferdinando, Anthony, Thomas, William, John*, and *Robert* (of whom *John Tracy Atkins* was the survivor,) successively for life, but not in order of seniority, and to their first and other sons successively in tail male, with remainder to his own right heirs, and died on the 29th of September 1728.

John the son died on the 23d July 1773, without issue, and intestate as to this reversion: whereupon all the other nephews being dead without issue, it descended in equal sevenths on the seven surviving sisters of *Francis Keck* as coparceners; of whom *Winifred* the wife of *John Nichol* was one, and *Mary* the mother of Mr. *Freeman* the plaintiff was another.

In 1740 *Winifred Nichol* died, without having devised or disposed of the reversion of her undivided seventh part of the said estate; and thereupon the same descended on her only son and heir *John Nichol*, father of Lady *Carnarvon* aftermentioned.

John Nichol the son, by will dated the 5th of March 1746, gave all his real and personal estate to trustees in trust for his daughter *Margaret Nichol* at 21, and her heirs; and if she died before 21, leaving issue of her body, then in trust to convey the same to the heirs of her body.

Overtures having been made for a marriage with Miss *Nichol* to the Marquis of *Carnarvon*, proposals were laid before the master, entitled proposals for a settlement, &c. viz. "That in consideration of the said marriage and fortune in money and lands of Miss *Nichol*, to be disposed of as aftermentioned, &c. it was thereby agreed, that as soon after the marriage as the said *Margaret Nichol* should attain the age of 21 years, the freehold and copyhold estates of her grandfather and father, should be settled upon the trusts there mentioned."

The

The Master reported the proposals proper, in consequence of which articles were to be approved of, and were accordingly approved of by the Master.

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The articles recited the proposals, they also recited all the real and personal estates which Miss *Nichol* was entitled to, under her grandfather and father's will, and the particulars were set out in several schedules by the Master; and it was thereby agreed, that they should be settled to the uses there mentioned. Upon the Marchioness coming of age, an act of Parliament 22 Geo. 2. c. 24. was made, intituled, "An act for settling the real and leasehold estates of the most honourable *Margaret Brydges*, commonly called Marchioness of *Carnarvon*, wife of the most honourable *James Brydges*, Esquire, commonly called Marquis of *Carnarvon*, and late *Margaret Nichol* spinster, an infant, for the benefit of the said Marquis and Marchioness and their issue; and for applying part of the personal estate of the said Marchioness for the purposes therein mentioned."

The act reciting the proposals, articles, &c. enacts, "That all and singular the freehold and copyhold estates of the said *Margaret* now Marchioness of *Carnarvon* (except as is therein excepted) in the third and fourth schedule to the articles mentioned, and all other the manors, messuages, lands, tenements and hereditaments, freehold and copyhold, of the grandfather and father of the said *Margaret*, situate in the several parishes of *St. Andrew, Holborn, &c.* or elsewhere in *London*; and in the several parishes of *Fryern, Barnes, &c.* or elsewhere in the county of *Middlesex*; and in the parish of *South Stoneham* or elsewhere in the county of *Southampton*, and ELSEWHERE, &c. shall be vested and settled to the uses therein mentioned." The only variation between the articles and the act was, that certain debts of the Marquis were to be paid, and in consideration of the Marchioness agreeing thereto, all her estates were to be settled upon her and her heirs, in case she survived the Marquis having no issue, or failing issue between them.

At the time of the marriage and also at the time of passing the act, *Robert Tracy, Anthony, Thomas, and John* were alive, and *Thomas* had then a son living named *Dodwell*.

Margaret Marchioness of *Carnarvon* died on the 14th day of *August* 1768, without issue, and without having made any disposition of the said estates of her late grandfather and father, and intestate.

Mr.

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Mr. *John Tracy Atkins* died on the 23d of July 1773, without issue; and then the reversion of the estates now in question dropt in, and devolved on the co-heirs of the said *Francis Keck*, or the persons claiming under them: and the Duke of *Chandos* having claimed the share late belonging to Lady *Carnarvon*, and the co-heirs opposing the claim, Mr. *Freeman* filed a bill in *Chancery* against the Duke and all the other claimants for a partition, and by his bill controverted the Duke's claim, and his Grace filed a cross bill to establish it.

The question was, Whether the reversion in fee of one undivided 7th part of the estate in question, passed under the act of parliament to the defendant the Duke of *Chandos*?

* Vide the
words of the
enacting
clause before
mentioned.

Mr. *Buller* for the defendant argued, that the intention of the parties was, to settle all the estate both real and personal of Miss *Nichol*, except what was particularly excepted: that the proposals were general, without any exception; that both the articles and act of parliament, were intended to carry the proposals into execution; and that the words "and elsewhere" in the enacting part of the statute page 17*. were sufficient to carry the reversion of this undivided 7th part, though not expressly mentioned. And if so, the court would give effect to so material a word, rather than reject it; more especially as this was the case of a deed; and cited 3 P. Wms. 56.

Mr. *Kenyon*, contra, for the plaintiff said, he did not deny that the words were large enough to carry the reversion in question, if it appeared to be the clear intention of the parties that it should pass. But he denied there was any such intention. And if so, the court would control the operation of the words "and elsewhere" which were a loose general expression, rather than give it effect contrary to the intent of the parties. And so it was done in the case of *Strong versus Teat*, 2 Burr. 912. Here, the proposals moved from the Duke of *Chandos*, whose object it was to get as much of the property of Miss *Nichol* as he could. That there was not a surmise of this reversion even being known to the Master; that the articles extended to nothing more than was contained in the proposals; and that the act of parliament did not include even so much. Consequently, as nothing appeared in either of these instruments from which it could be collected that the parties had this reversion in view at the time, the court would restrain the generality of the expression to those estates only, which were in the contemplation of the parties.

Lord

Lord MANSFIELD.—The material point in this case is, what the meaning of the parties was, *before* the passing of the act: that is, whether any thing was then in contemplation, except what the Marchioness was in possession of. — I have seen settlements in which it has been provided, that if any estate shall descend to the wife during coverture, it shall be settled to such and such uses in the settlement named. In this case, the reversion was after four sons and their issue; and one of them had then a son living; so that it could be of no great value. We will think of it. If we have any doubt, it may be argued again, but if clear we will make our certificate.

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CHANDOS,

Afterwards, on the 28th of November in this term, the court certified in these words:

“ Having heard counsel on both sides, and considered this case, we are of opinion, from the proposals, report and articles, that the *intention* of the parties was to settle *all* the real and personal estate of Miss *Nichol* which she had from her father or grandfather, except what was particularly excepted: Though, probably, this remote reversion might not then be in contemplation; and, therefore, the words of the articles do not expressly include it. We consider the act of parliament, as a settlement, to execute the articles, with the variations mentioned in the preamble: and though this remote reversion might not then be particularly thought of, yet the *general* words are *sufficient* to include it; and the *intention* of the parties was to include *all*. Therefore, we are of opinion, that the *reversion in fee*, of one undivided seventh part of the estate in question, *did pass*, by the act of parliament in the pleadings mentioned, to the defendant the Duke of Chandos.”

FREEMAN Esq. *versus* Duke of CHANDOS *et al. et c* Same day.
contra.

THIS was a branch of the last case and sent from the Court of Chancery also for the opinion of this court; the material facts were as follow:

Robert Tracy, in whom the reversion in fee of one undivided seventh part of the *Keck* estate, (*vide* the last case,) was vested as claiming under one of the co-heirs of the said *Francis Keck*, made his will dated 16th of October 1766, and thereby devised “all *England* to trustees subject to certain charges thereon, and limitations in his marriage settlement named; in trust to stand seised of the said estates in *G. and W. or elsewhere*, to certain uses. His estates in *G. and W.* were the only estates charged or mentioned in his marriage settlement. But he was also entitled to a reversion of certain estates in the counties of *Oxford and Wilts.* Held that this reversion passed by the words “*elsewhere in the kingdom of England.*”

One devises
all his estates,
&c. in the
counties of
Gloucester
and Worcester
and elsewhere
in the
kingdom of
England to
trustees sub-

“ and

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" and every his manors, messuages, lands, tenements, hereditaments, and premises with their and every of their rights, members and appurtenances, in the counties of *Gloucester* and *Worcester* and *elsewhere in the kingdom of England*, and all his estates, use, benefit and interest in reversion, remainder or expectancy, to trustees, subject to certain charges thereon, and to certain limitations and estates to all his brothers severally, and their respective first and other sons in and by his marriage settlement, bearing date the 5th of *August* 1735, expressed and declared; in trust, in case he himself and his said brothers should all die without issue male of his or their body or bodies, or his said brothers should die before the age of 21, then, to stand seised of the said estates in *Gloucester*, *Worcester* or *elsewhere* and the reversion or reversions of such estates, and of all his estate, use, benefit, and interest in reversion and expectancy therein to the uses there mentioned."

By the marriage settlement of *Robert Tracy*, the estates in *Gloucester* and *Worcester* were limited to himself for life, remainder to his first and other sons in tail male, remainder to his three brothers *John*, *Thomas*, and *Anthony*, and their said first and other sons, successively in strict settlement.

After the death of *Robert Tracy* without issue, on the 28th *September* 1767, *John Tracy* thinking the reversion in question did not pass by the will of *Robert Tracy*, made a codicil to his own will dated *August* 1st 1768, and thereby devised the same to trustees on the trusts there mentioned.

Lady Hereford, the first devisee under *Robert Tracy's* will, claimed this reversion; as did likewise the devisees under the codicil of *John Tracy*.

The question was, whether the reversion in fee of one undivided seventh part of the *Keck* estate vested in *Robert Tracy* did pass by the will of *Robert Tracy*?

Mr. Kenyon was about to argue for *Lord Hereford*, but *Lord Mansfield* called upon the other side to go on.

Mr. Butler for *Mr. Freeman* argued, that from the words of the will referring to the limitation of the estates in the counties of *Gloucester* and *Worcester* and the charges thereon, it was manifest the testator had no other estates than those in contemplation, at the time of making his will; and therefore, the reversion in question, which was a reversion of estates in *Oxfordshire* and *Wiltshire*, would not pass by the words "*elsewhere in the kingdom of England*" and cited *Strong versus Teat*, 2 *Bur.* 912. as in point.

Lord

Lord *Mansfield* stopped Mr. *Kenyon*, saying it was too clear for him to give himself any trouble about it. If the words of the will are not sufficient to carry the premises in question, the dragnet of conveyances will never end.—Afterwards, on the 20th of *November* in this term, the court certified in these words.

“ Having heard counsel on both sides, and considered this case, we are of opinion that the reversion in fee of one undivided seventh part of the *Keck* estate, vested in *Robert Tracy*, did pass by the will of *Robert Tracy*.”

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CHANDOS

CHAMBERLIN *et al.* versus SONGHURST.

Friday,
Nov. 24th.

IN case, for money had and received to the plaintiff's use, the facts at the trial appeared to be as follows. The plaintiffs were owners of a waggon which passed loaded through a turnpike belonging to a turnpike road, called the *Kent* road.—The defendant was appointed by the trustees of that road a collector of tolls, and to weigh carriages passing on the said road under the statutes 13 *Geo.* 3. c. 84. and 14 *Geo.* 3. c. 82. among other acts. The plaintiff's waggon weighed 18 hundred overweight. The defendant insisted upon being paid at the rate of 20 *s.* per hundred for the whole overweight, which by that mode of calculation amounted to 18 *l.* and was paid accordingly.—Upon the general issue pleaded, a verdict was found for the plaintiffs for 13 *l.* & 6 *d.* and costs, subject to the opinion of the court on the following question; “ Whether the defendant ought to have received at the rate of 20 *s.* per hundred for more than three hundred weight of the eighteen hundred overweight.”

The additional toll to be paid by waggons overweight, must be according to the proportion named in the Stat. 14 *Geo.* 3. c. 82. sect. 2.—Not a gross charge at the highest additional toll incurred, upon the gross overweight.

In case he ought not to have received the whole sum of 18 *l.* the *posse* was to be delivered to the plaintiffs. In case he ought to have received the whole sum, a nonsuit was to be entered.

Mr. *Morgan* for the defendant argued, that by the construction of the statute 13 *Geo.* 3. c. 84. sect. 1. and 14 *Geo.* 3. c. 82. sect. 2. the defendant was entitled to take 20 *s.* additional toll for every hundred overweight, whenever such overweight exceeded fifteen hundred weight, which it did in this case; and, therefore, that a nonsuit ought to be entered.

Mr. *Lucas*, *contra*, for the plaintiffs insisted, that so much of stat. 13 *Geo.* 3. c. 84. as empowers the trustees to take an additional 20 *s.* per hundred for every hundred overweight, was repealed by stat. 14 *Geo.* 3. c. 82. sect. 2. and that the sum to be taken,

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BERLIN
versus
SONG-
HURST.

taken, as an additional toll for the overweight in this case, ought to have been calculated according to the following proportions mentioned in this latter statute; viz. 3 *d.* per hundred weight for the 1st and 2d hundred weight; 6 *d.* for every hundred weight above two, and not exceeding five; 2 *s.* 6 *d.* for every hundred above five and not exceeding ten; 5 *s.* for every hundred above ten, and not exceeding fifteen, and 20 *s.* for every hundred above fifteen, which would have amounted only to 4 *l.* 19 *s.* 6 *d.* in all, instead of 18 *l.* which was the sum demanded of, and actually paid by the plaintiff. And of this opinion was the court.

Per Cur. Postea delivered to the plaintiff.

WILKINSON *qui tam*, versus ALLOT.

Monday,
Nov. 27th.

Where a *qui tam* informer in debt on the *stat.* 21 *Hen.* 8. *c.* 13. is nonsuited, the defendant is entitled to costs.

IN debt upon the *stat.* 21 *Hen.* 8. *c.* 13. for non-residence, the defendant pleaded the general issue, and at the trial the plaintiff was nonsuited. Mr. *Davenport* for the plaintiff had obtained a rule to shew cause why the master should not be restrained from taxing the defendant his costs: and now in support of the rule, insisted, that as the plaintiff, if he had recovered, would not have been entitled to costs, it was neither legal, nor just, nor reciprocal, that in the event of his having failed, he should pay costs to the defendant. That by *stat.* 24. *H.* 8. *c.* 8. a defendant can have no costs on a nonsuit or verdict, where the plaintiff sues to the king's use, which was the case here; because half the penalty belongs to the king: That the *stat.* 18 *El.* *c.* 5. *sect.* 3. did not extend to this case, but only to cases where the *whole* of the penalty belongs to the informer, or where he is the party grieved, and cited 1 *Andersf.* 116. *pl.* 162. as expressly in point to this purpose.

Mr. *Partridge*, *contra*, mentioned the *stat.* 23 *Hen.* 8. *c.* 15. *sect.* 1. and *stat.* 4 *Jac.* 1. *c.* 3. *sect.* 2. but relied chiefly on the *stat.* 18 *El.* *c.* 5. *sect.* 3. the object of which he insisted was, to prevent vexation in common informers; and, therefore, had expressly provided, "that where any informer on any penal statute shall be nonsuited, he shall pay to the party defendant his costs and charges, &c." That nothing could be more vexatious than the present action, there being no less than sixteen charges of non-residence, in all of which the plaintiff had failed; and also a charge of occupying a farm contrary to the statute, in which he had likewise failed. That as to the distinction taken between a

common informer, who is entitled only to *half* the penalty, and one who is entitled to the *whole*, no such distinction is to be found in the books : But the distinction is between a *common informer* and the *party grieved*, the former being liable to costs, the latter not ; and cited 1 *Barnes* 124. *Jeynes qui tam v. Stephenson* *, as in point. That here the plaintiff was not the party grieved, and therefore was liable to costs.

1775.

WILKIN-
SON
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* Vide 2
Leon. 116.
Doghead's
case.

Mr. *Graham* on the same side cited *Salk.* 30. *Kirkham v. Wheeler*. "Prosecutors *qui tam*, are looked upon as common informers:" and a note at the end of that case, in which it is said, that "where a statute gives a penalty to a *stranger*, he is a *common informer*, and shall pay costs upon *stat.* 18 *El. c. 5* : otherwise where the statute gives it to the *party grieved*, for he is "not liable to costs."

Lord *Mansfield*. It is a certain principle that the king himself neither pays nor receives costs in any case. But this is not a suit prosecuted by the king, though he would have been entitled to a moiety of the penalty if it had been recovered : But it is the suit of a common informer. The *stat.* 23 *Hen. 8. c. 15.* is out of the case. But the *stat.* 18 *El. c. 5.* is decisive. In these *qui tam* actions, there is liberty given to the informer, by the same clause of the statute as provides for costs, to compound for the offence with leave of the court, which shews they are common informers. It is an exceedingly plain case. I think the plaintiff ought to pay costs, and also the costs of this motion.

ASTON Justice.—There is a case of *Greetham versus* the Inhabitants of the hundred of *Theale*, reported in 3 *Burr.* 1723, the ground of which, after it was decided, some of the judges thought the court had quite mistaken and misapprehended. Mr. Justice *Wilmot* and I thought so upon talking it over afterwards, and were for setting the matter right, but the costs were taxed. The mistake upon which the court went was, that the plaintiff being the *party grieved*, would have been entitled to costs if he had recovered ; and, therefore, having failed, ought to pay costs to the defendant. But in fact, the plaintiff would not have been entitled to costs on the *stat.* 9 *Geo. 1. c. 22. sect. 7.* upon which that action was brought ; because it is a statute *subsequent* to the statute of *Gloucester*, which gives costs only where damages were before recoverable. Now before the *stat.* 9 *Geo. 1. c. 22.* no damages were recoverable for what is there made the subject of an action against the hundred ; therefore the plaintiff could not have had costs if he had succeeded ; and consequently the
defendant

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SON
versus
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defendant was not entitled to any under the *stat. 4 Jac. 1. c. 3.* I would not have that case therefore, considered as a precedent; because the court afterwards found that they had certainly misapprehended the ground upon which they determined it.

The distinction taken in the books is this; wheresoever a statute subsequent to the statute of *Gloucester* increases damages to the double or treble value, where damages were *before given*, the plaintiff shall recover *costs*, and those costs shall also be doubled or trebled, as the statute may be. But where single, double, or treble damages are *newly given* by such subsequent statute, where *no damages were formerly recoverable*, there the plaintiff shall recover those damages only, and *no costs*: because the statute of *Gloucester* does not operate to add costs to what is given by such subsequent statute. 2 *Inst.* 289. *Gilb. Hist. C. P.* 258, 259. Therefore I am of opinion the rule ought to be discharged.

ASHHURST Justice. The object of this statute was to prevent vexation in common informers; and therefore, in that respect, there is no distinction between a common informer *qui tam*, and one who is entitled to the whole penalty; for he may be just as vexatious when he prosecutes on behalf of the king and himself jointly, as when he sues on his own separate account.

Per Cur. Rule discharged.

THE END OF MICHAELMAS TERM.

HILARY TERM

16 GEORGE III. B. R. 1776.

FARREN *qui tam*, versus WILLIAMS.Tuesday,
Jan. 23d.

THIS was an information *qui tam* on the statute 5 *El. c. 4. sect. 39.* brought in the court of Quarter Sessions, in the city of London, against the defendant, for exercising the trade of a tallow chandler, not having served seven years apprenticeship. It was removed by *certiorari* into this court, and tried before Lord Mansfield at the sittings after Trinity Term 1775, when the defendant was found guilty.

Wilkes Jus-
tice absent.
The Quarter
Sessions may
proceed by
information,
on the stat.
5 *Elm. c. 43*
for exercis-
ing a trade,
not having
served an
apprentice-
ship for
seven years.

Mr. Dunning last term obtained a rule to shew cause, why the judgment should not be arrested for want of jurisdiction in the sessions, upon the authority of the resolution of B. R. upon the stat. 21 *Jac. c. 4. sect. 1.* in Sir *Wm. Jones* 193.

Mr. Wallace, Mr. Bearcroft and Mr. Buller now shewed cause, and insisted, that by the statute 5 *El. c. 4. sect. 39.* and stat. 31 *El. c. 5. sect. 7.* the quarter sessions had a jurisdiction by information; otherwise they could have no jurisdiction at all, for they certainly could not proceed by way of indictment: and cited 1 *Bur.* 543. *Rex v. Wright.* 1 *Salk.* 373. *Hob.* 183. 327.—*Cro. Jac.* 75. 178. *Andr.* 216. *Rex v. Holmes.*

Mr. Dunning for the defendant said, he admitted the courts of Westminster could not take cognizance of offences against the stat. 5 *El. c. 4.* unless committed within the county where the courts sit; and so the cases cited certainly proved, but they proved no more. But what he should contend for was, that the court of Quarter Sessions had no authority to proceed by information in any case, unless it was expressly given them by statute: And that the statute in this case gave no such authority. In support of this general proposition, he cited 6 *Co.* 19 *b.* *Gregory* versus *Blossfield*, and *Cro. El.* 737. *Barnaby v. Goodale*: Where in error from a judgment in *Bury* upon an information on the stat. 5 *El. c. 4.* that point was expressly adjudged.

Lord Mansfield asked, if it appeared that the information in that case was before the Quarter-Sessions.

Mr. Dunning. It does not expressly appear in words, but it could be at no other court: if it had been at the sessions of oyer and terminer, the objection would equally hold.—As to the objection that

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LIAMS.

the Quarter Sessions have no jurisdiction at all, unless they can proceed by information, they clearly may proceed by indictment. The modes of proceeding are by *stat. 5 Eliz. c. 4. sect. 39.* given distinctly and separately, *reddendo singula singulis*: Civil jurisdiction, by suit, &c. to Courts of civil judicature; criminal jurisdiction, to Courts of criminal judicature; and bill of complaint, to the president in council.

Lord MANSFIELD.—The whole question turns upon the 39th section of the statute. The words are very much embarrassed, and the matter does not seem to be settled by any of the cases. I wish to know the practice; and to inquire of some of the old clerks of assize how the usage has been at *oyer and terminer*.

Mr. Wallace said there had been some tried at *Lancaster*.

ASTON Justice.—And elsewhere. I do not think the old case of *Gregory v. Blashfield* in 6 Co. 19. is conclusive: And if it has been a practice long received, we should do wrong to overset it. As to the case of *Barnaby v. Goodale*, Cro. El. 737. it does not appear that the court at *Bury* was a court of sessions, or of *oyer and terminer*. *Cur. advisare vult.*

The next day Lord Mansfield mentioned this case, and cited an opinion of Holt Chief Justice when at the bar, out of a note book belonging to the late Mr. Gill of *Durham*. The question submitted for Holt's opinion was, "Whether an action could be brought in the corporation court for exercising a trade contrary to the *stat. 5 El. c. 4?*" and the opinion was as follows; "I conceive an action cannot be brought in the corporation court: But an information *qui tam* may be brought in the corporation court of sessions. *John Holt.*" His Lordship added, that he had mentioned it to several of the judges, who said it had been customary on the circuits to try such informations.

Mr. Justice Aston said, he had inquired of some persons of great experience in sessions business; and was informed by them, that it had been usual to file such informations.

Per Cur.—The rule for arresting the judgment must be discharged.

Wednesday,
Jan. 24th.
Willes Jus-
tice absent.
The office
of parish
clerk is a
temporal of-
fice; and
tho' ap-
pointed by
the minister

REX versus ERASMUS WARREN Clerk.

MR. Buller last term shewed cause against a *mandamus* to restore William Readshaw to the office of parish clerk of *Hampstead*: He stated that the clerk was appointed by the minister. That he had since become bankrupt, and had not obtained his certificate; that he had been guilty of many omissions if removed by him without sufficient cause, a *mandamus* will lie to restore him.

in

in the register; was actually in prison at the time of his removal, and had appointed a deputy who was totally unfit for the office: And therefore submitted that there was sufficient cause for removing him.

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WARREN.

Mr. Lucas, *contra*, insisted that the office of parish clerk is a *temporal* office *durante vita*: That the parson cannot remove him: and that he has a right to appoint a deputy: And cited 1 Bur. 367. 2 Str. 942.—1108. 11 Mod. 261.

LORD MANSFIELD then said, there was an application of this sort in a case, *Rex v. Proctor*. Mich. 15 Geo. 3. where the parson removed a parish clerk appointed by the former incumbent. There the right of amotion was in question; and all agreed it must be somewhere, but that case was not decided.

ASTON Justice.—The court in that case recommended it to the minister to restore him upon his asking pardon*.

LORD MANSFIELD.—What remedy is there in *Westminster-hall* to remove him? He certainly has his office only *quamdiu bene se gesserit*. But though the minister may have a power of removing him on a good and sufficient cause, he can never be the sole judge and remove him *ab libitum*; without being subject to the control of this court.

ASTON Justice.—As long as the clerk behaves himself well he has a good right and title to continue in his office: Therefore if the clergyman has any just cause for removing him, he should state it to the court.—Accordingly the court enlarged the rule to this term, that affidavits might be made on both sides, of the cause and manner of amotion. *Adjournatur*.

And now on this day, upon reading the affidavits, Lord Mansfield said, it was settled in the case of *Rex v. Dr. Ashton*, 28 Geo. 2. 1754. "That a parish clerk is a *temporal* officer, and that the "minister must shew ground for turning him out." Now in this case, there is no sufficient reason assigned in the affidavits that have been read, upon which the court can exercise their judgment; nor is there any instance produced of any misbehaviour of consequence: Therefore the rule for a *mandamus* must be absolute.

Per Cur. Rule absolute.

HAMBLY *et al'*, Assignees of MOON *versus* Same day.

TROTT Administrator.

IN Trover against an administrator *cum testamento annexo*, the declaration laid the conversion by the *testator* in his lifetime.

Trover does not lie against an executor for a conversion by his testator.

* I omitted inserting the case of *Rex versus Proctor* in it's place, because it was compromised as above; and the Court gave no opinion.

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versus
TROT.
* Trin. 22
& 23 Geo.
2. B. R.

Plea, that the *testator* was not guilty. Verdict for the plaintiff.

Mr. Kerby had moved in arrest of judgment upon the ground of this being a personal *tort*, which dies with the person; upon the authority of *Collins v. Fennerell**, and had a rule to shew cause.

Mr. Buller last term shewed cause.—The objection made to the plaintiff's title to recover in this case is founded upon the old maxim of law which says, *actio personalis moritur cum persona*. But that objection does not hold here; nor is the maxim applicable to all personal actions; if it were, neither *debt* nor *assumpsit* would lie against an executor or administrator. If it is not applicable to all personal actions, there must be some restriction; and the true distinction is this: Where the action is founded merely upon an injury done to the person, and no property is in question; there, the action dies with the person: as in assault and battery, and the like. But where property is concerned, as in this case, the action remains notwithstanding the death of the party.

Trover is not like trespass, but lies in a variety of cases where a party gets the possession of goods lawfully. It is founded solely in *property*: And the value of the goods only can be recovered. Therefore, the damages are as certain as in any action of *assumpsit*. As to the case of *Collins v. Fennerell* it is a single authority and was not argued; therefore, most probably was determined simply on the old maxim. But *Savile* 40, case 90. is directly the other way.

Where the damages are merely vindictive and uncertain, an action will not lie against an executor; but where the action is to recover property, there the damages are certain, and the rule does not hold. This is an action for sheep, goats, pigs, oats, and cyder converted by injustice to the use of the person deceased: Therefore, this action does not die with the person.

Mr. Kerby *contra* for the defendant cited, *Palm.* 330. where Jones Justice said, "that when the act of the testator includes a *tort*, it does not extend to the executor; but being personal dies with him; as *trover* and *conversion* does not lie against an executor for *trover fait par luy*." *Collins v. Fennerell* above cited.

Here, the goods came to the hands of the testator, and he converted them to his own use. Trover is an action of *tort*; and conversion is the gist of the action: No one is answerable for a *tort*, but he who commits it; consequently this action can only be maintained against the person guilty of such conversion. But here the conversion is laid to be by the testa-

tor. Therefore the judgment must be arrested. The distinction that has been taken in the books is, that the action may be maintained by an executor but not against him. *Popham* 31. *Hughes v. Robotham*. *Popham* 139. *Le Mason v. Dixon*.

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TROT.

LORD MANSFIELD. If this case depends upon the rule, *actio personalis moritur cum personâ*, at present only a *dictum* has been cited in support of the argument. Trover is in form a *tort*, but in substance an action to try property.

Mr. Kerby. The executor is answerable for all contracts of the testator, but not for torts.

LORD MANSFIELD. The fundamental point to be considered in this case is, whether if a man gets the property of another into his hands it may be recovered against his executors in the form of an action of trover, where there is an action against the executors in another form. It is merely a distinction whether the relief shall be in this form or that. Suppose the testator had sold the sheep, &c. in question: In that case, an action for money had and received would lie. Suppose the testator had left them in specie to the executors, the conversion must have been laid against the executors. There is no difficulty as to the administration of the assets, because they are not the testator's own property. Suppose the testator had consumed them, and had eaten the sheep; what action would have lain then? Is the executor to get off altogether? I shall be very sorry to decide that trover will not lie, if there is no other remedy for the right.

ASTON Justice. Suppose the executor had had a counter demand against the plaintiff, he could not have set it off in Trover: but in an action for money had and received, he might. If these things had been left by the testator in specie, the conversion must have been laid to be by the executor. There seems to be but little difference between actions of trover, and actions for money had and received. As at present advised, I incline to think trover maintainable in this case.

ASHHURST Justice. The maxim does not hold as an universal proposition; because *assumpsit* lies. As to the case of *Collins v. Fennerell*, all the court considered it as unargued, and given up rather prematurely by Mr. Henley.

LORD MANSFIELD. The criterion I go upon is this: Can justice possibly be done in any other form of action? Trover is merely a substitute of the old action of detinue. 2 *Keb.* 502. *Ventr.* 30. *Sir T. Raym.* 95.—The Court ordered it to stand over.

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TROT.

Upon a second argument this day, Mr. *Dunning* cited *Cro. Car.* 540—1 *Sid.* 88.

LORD MANSFIELD. Many difficulties arise worth consideration. An action of trover is not now an action *ex maleficio*, though it is so in form; but it is founded in property. If the goods of one person come to another, the person who converts them is answerable. In *substance*, trover is an action of property. If a man receives the property of another, his fortune ought to answer it. Suppose he dies, are the assets to be in no respect liable? It will require a good deal of consideration before we decide that there is no remedy.

ASTON, Justice. The rule is, *quod oritur ex delicto, non ex contractu*, shall not charge an executor. 2 *Bac. Abr.* 444, 445. *tit. Executors and administrators.* 5 *Bac. Abr.* 280. *tit. Trover.* Where goods come to the hands of the executor in *specie*, trover will lie; where in *value*, an action for *money had and received*. But the difficulty with me is, that here it does not appear whether the goods came to the hands of the defendant in *specie* or in *value*.

Cur. advisare vult.

Afterwards, on *Monday, February 12th*, in this term, Lord *Mansfield* delivered the unanimous opinion of the court as follows:

This was an action of trover against an administrator, with the will annexed. The *trover* and *conversion* were both charged to have been committed by the testator in his life-time: The plea pleaded was, that the testator was *not guilty*. A verdict was found for the plaintiffs, and a motion has been made in arrest of judgment, because this is a *tort*, for which an executor or administrator is not liable to answer.

The maxim, *actio personalis moritur cum personâ*, upon which the objection is founded, not being generally true, and much less universally so, leaves the law undefined as to the kind of personal actions which die with the person, or survive against the executor.

An action of trover being in *form* a *fiction*, and in *substance* founded on *property*, for the equitable purpose of recovering the value of the plaintiff's specific property, used and enjoyed by the defendant; if no other action could be brought against the executor, it seems unjust and inconvenient, that the testator's assets should not be liable for the value of what belonged to another man, which the testator had reaped the benefit of.

We

We therefore thought the matter well deserved consideration: We have carefully looked into all the cases upon the subject. To state and go through them all would be tedious, and tend rather to confound than elucidate. Upon the whole, I think these conclusions may be drawn from them.

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TROTTE.

First, as to actions which survive against an executor, or die with the person, on account of the *cause of action*. *Secondly*, as to actions which survive against an executor, or die with the person, on account of the *form of action*.

As to the *first*; where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator, by the work and labour, or property of another, or a promise of the testator express or implied; where these are the causes of action, the action survives against the executor. But where the cause of action is a *tort*, or arises *ex delicto* (as is said in Sir T. Raym. 57, *Hole v. Blandford*,) supposed to be *by force and against the King's peace*, there the action dies; as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a water course, escape against the sheriff, and many other cases of the like kind.

Where the cause of action is money due, or a contract to be performed, gain or acquisition by the labour or property of another, or a promise by the testator expressed or implied, the action survives against the executor. Otherwise, if it be a *tort*, or arise *ex delicto*, supposed to be *by force*, and *against the peace*.

Secondly, as to those which survive or die, in respect of the *form of action*. In some actions the defendant could have waged his law; and therefore, no action in that form lies against an executor. But now, other actions are substituted in their room upon the very same cause, which do survive and lie against the executor.—No action where in form the declaration must be *quare vi et armis, et contra pacem*, or where the plea must be, as in this case, that the *testator was not guilty*, can lie against the executor. Upon the face of the record, the cause of action arises *ex delicto*; and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender.

But in most, if not in all the cases, where trover lies against the testator, another action might be brought against the executor, which would answer the purpose.—An action on the custom of the realm against a common carrier, is for a *tort* and supposed crime: The plea is *not guilty*; therefore, it will not lie against an executor. But *assumpsit*, which is another action for the same cause, will lie.—So if a man take a horse from another, and bring him back again; an action of trespass will not lie against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor.

There is a case in Sir Thomas Raymond, 71*, which sets this matter in a clear light: There, in an action upon the case, the plain-

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* *Bailey v. Birles et ux.*: executrix of Richard Bailey.

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versus
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tiff declared, "that he was possessed of a cow, which he delivered to the testator, *Richard Bailey*, in his lifetime, to keep the same for the use of him the plaintiff; which cow the said *Richard* afterwards sold, and did convert and dispose of the money to his own use; and that neither the said *Richard*, in his life, nor the defendant after his death, ever paid the said money." Upon this state of the case, no one can doubt but the executor was liable for the value. But the special injury charged, obliged him to plead, that the testator was not guilty. The jury found him guilty. It was moved in arrest of judgment, because this is a tort for which the executor is not liable to answer, but *moritur cum persona*. For the plaintiff it was insisted, that though an executor is not chargeable for a *mis-feasance*, yet for a *non-feasance* he is: as for non-payment of money levied upon a *feri facias*, and cited *Cro. Car. 539. 9 Co. 50.^b* where this very difference was agreed; for non-feasance shall never be *vi et armis*, nor *contra pacem*: But notwithstanding this the court held "it was a tort, and that the executor ought not to be chargeable." Sir *Thomas Raymond* adds, "*vide Saville 40. a difference taken.*" That was the case of Sir *Henry Sherrington*, who had cut down trees upon the Queen's land, and converted them to his own use in his life-time. Upon an information against his widow, after his decease, *Manwood*, Justice, said, "In every case where any price or value is set upon the thing in which the offence is committed, if the defendant dies, his executor shall be chargeable; but where the action is for damages only, in satisfaction of the injury done, there his executor shall not be liable." These are the words Sir *Thomas Raymond* refers to.

Here therefore is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expence of the sufferer, as beating or imprisoning a man, &c. there, the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall.

So far as the tort itself goes, an executor shall not be liable; and therefore it is, that all public and all private crimes die with the offender, and the executor is not chargeable; but so far as the

act

act of the offender is beneficial, his assets ought to be answerable; and his executor therefore shall be charged.

There are express authorities, that trover and conversion does not lie against the executor: I mean, where the conversion is by the testator. Sir *William Jones*, 173—4, *Palmer*, 330. There is no saying that it does.

The form of the plea is decisive, *viz.* that the *testator* was *not guilty*; and the issue is to try the guilt of the testator. And no mischief is done; for so far as the cause of action does not arise *ex delicto*, or *ex maleficio* of the testator, but is founded in a duty, which the testator owes the plaintiff; upon principles of civil obligation, another form of action may be brought, as an *action for money had and received*. Therefore, we are all of opinion that the judgment must be arrested.

Per Cur.

Judgment arrested.

REX *versus* Doctor WINDHAM, Warden of Wadham College.

Thursday,
Jan. 25th.

LORD MANSFIELD.—This is an application, by the majority of the Fellows of *Wadham* college to this court, for a *mandamus* to be directed to the warden of the college, to compel him to affix the common seal of the college to an answer of the sub-warden, bursars, dean and principal officers of the college, to a bill filed in the Court of Chancery by *Thomas Lloyd* against the warden, fellows, and scholars. The object of the bill is to compel the execution of a lease according to an agreement alleged to have been made by the college, but which the fellows now insist was not made by a majority of them, as it ought to have been. The warden disapproves of the answer of the fellows, and therefore has refused to put the seal of the college to it.

Mandamus granted to compel the warden of *Wadham* college to affix the common seal of the college to an answer of the fellows, &c. in Chancery, contrary to his own separate answer put in.

The ground on which the application has been made is, that there is no other remedy by which the end can be specifically obtained.

In the Court of Chancery, when a bill is brought against a corporation, if the corporation is in contempt, there is no remedy by way of proceeding for a contempt *personally* against the real parties who offend; but the mode of compulsion is by sequestration. In that case, the plaintiff is to proceed to take possession of all the personal estate of the college; and if that will not make the members agree, he is to take possession by sequestrators of all the

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the rents and profits of their real estate. This mode of proceeding would affect the whole body, and punish the corporation at large. But the corporation at large is not in fault here; the majority of the body have obeyed the process of the court of Chancery, as far as in their power lies, and are ready to put in their answer. But an individual, the warden, whose act is necessary to render that answer complete, lies by, and refuses to put the seal of the college to it. I believe it is the first instance of the kind; and the Court of Chancery has staid its process for the contempt, in mercy to the acquiescing parties, that the present application might be made.

Mr. *Kenyon* has said very truly, that where there is no other legal specific remedy to attain the ends of justice, the course must be by *mandamus*, which is a prerogative writ; and the very form of it, shews its object is to prevent a defect of justice. Thus it comes recommended by the Court of Chancery to have it specifically done. But further, the parties out of caution have applied likewise to the visitor. He acquiesces in the application to this court for a *mandamus*, and very rightly. For who could ever entertain a thought or idea of this being a dispute proper for the visitor to decide. It is not a private dispute; but a suit by a third person against the whole body, for the specific performance of an agreement. An application to the visitor in such a case is nugatory; for he cannot compel a specific performance. But the court, if they have jurisdiction of the cause, will enforce it by their own means.

So where an estate is in the college, that is, in the whole body, and they are to act in a trust; the visitor cannot meddle in a matter which is the proper subject of such trust. *Green v. Rutherford* before Lord *Hardwicke* assisted by Sir *John Strange*, 1 *Vez.* 462.

Then, is it new in principle to apply for a *mandamus*, to have a corporation seal put to an instrument? Certainly not. The case of the *Lord High Steward of the University of Cambridge** is an authority upon the subject. Here, the application is for a *mandamus*, to compel the warden to put the seal to an answer. If the parties have a right, we shall stop all proceedings by refusing it, for the Court of Chancery cannot proceed without the seal is put.

Doctor *Windham* seems to have misconceived the consequence of his affixing the seal to the answer of the fellows, and to think it will make his corporate answer inconsistent with his private separate answer; for he is of opinion the plaintiff's suit is just, and that

* 1 *Black.
Rep.* 547.

that the agreement ought to be executed. But his putting the college seal does not contradict his private separate answer: And by refusing to put it, he defeats the end he wishes to obtain.

As to the statute concerning the college seal being put, Dr. *Windham* contends for a negative; and that the warden must be one. The words of the statute are these: "Hoc etiam volo, ut solitudine cautum sit, ut nihil sigilletur, quod non per GARDIANUM et majorem partem sociorum mature deliberatum concordatur, et per EOSDEM comprobatur." I am clear these words do not give the warden a negative. Warden and fellows are a description of the corporation; and the expression "per eosdem," without any repetition of the word *gardianum* must mean the major part of the body. Therefore I am of opinion a *mandamus* ought to go.

The three other judges concurred.

Per Cur. Rule for a *mandamus* absolute.

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DRIVER *ex dim.* EDGAR *versus* EDGAR.

Friday,
Jan. 26th.

IN ejectment, upon not guilty pleaded, a verdict was found for the plaintiff, subject to the opinion of the court upon the following case,

Devereux Edgar, being seised of the premises in question, duly made his last will, and among other things devised as follows: "I give and bequeath unto my daughter *Temperance Edgar*, all that my farm or estate called the *Breed* farm, &c. to hold the same, from and after the death of my wife, to the said *Temperance* my daughter, and to the heirs of her body lawfully begotten, and for want of such heirs, to my right heirs for ever. *Item*, I give and bequeath unto my daughter *Mary Edgar*, all that my farm, &c. to have and to hold all the said premises, to the said *Mary* my daughter, and the heirs of her body lawfully to be begotten immediately after the decease of my wife. Also I give to my said daughter *Mary Edgar*, all that my farm, &c. to have and to hold the said last mentioned farm and premises, from and immediately after my dear wife her mother's decease, to the said *Mary*, and to the heirs of her body lawfully to be begotten. And herein my mind and will is further declared, that in case either of my said daughters, *Temperance* or *Mary*, shall happen to

One devise to his daughter an express estate tail; but afterwards says, such devise shall be void as to inheritance of heirs if she die without issue, and then the estate shall descend to his heir male. A common recovery suffered by tenant in tail in her life-time is good, though she afterwards die without issue.

die

1776. *die* or depart this life, single, married, or widows, *not leaving children* or *child* living at their decease legally begotten, that then her gift, legacy or bequest herein, or estate given her by this my will, shall be entirely void, as to inheritance of heirs, and of none effect: and the estate so given her, so dying without heirs of her body, shall descend and go to my heir male, and his heirs male; and he and they, so inheriting the said bequeathed estate, shall pay or cause to be paid to the surviving sister my daughter, the sum of thirty pounds yearly, during her natural life, free of all taxes and deductions whatsoever.

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The said *Devereux Edgar* died so seised as aforesaid, leaving the said *Temperance* his wife, since deceased, *Robert Edgar* since deceased, father of the lessor of the plaintiff, his eldest son, *Devereux Edgar*, his second son, and two daughters, *Temperance Edgar*, one of the devisees, who died unmarried, and *Mary Edgar* the other devisee. In Hilary Term 1774, *Mary Edgar* suffered a common recovery of the premises in question, the uses of which recovery were to herself in fee; and afterwards made her will, by which she devised part of the premises in question to her niece *Mary Edgar* in fee, and the remaining part to her nephew *Devereux Edgar*, the defendant in fee; and soon after died unmarried, without having revoked the same.

The question reserved for the opinion of the court was, Whether the recovery suffered by *Mary Edgar*, was sufficient to bar the several estates claimed by the lessor of the plaintiff?

This case was argued twice; first, in last term by Mr. *Wilson* for the plaintiff, and Mr. *Davenport* for the defendant; and now in this term by Mr. *Mansfield* for the plaintiff, and Mr. *Wallace* for the defendant.—On the first argument, Lord *Mansfield* said, he had not any doubt himself at that time, but wished to look into a case or two. The next day, Lord *Mansfield* directed this cause to stand over for further argument, and said, the first point is, Whether *Mary*, the daughter, had not necessarily an estate tail to the hour of her death: if she had not, the devise to the heirs of her body must be a contingent remainder to them, as purchasers. If so, the next remainder to the heirs male of the testator must be void; for there cannot be a contingent remainder limited upon a contingent remainder. The next point is, Whether it is possible for heirs of the body to take as purchasers at all. Upon looking into the cases, I have found one which is very like the present, in 2 *Bac. Abr.* 59, 60. *Fountaine v. Gooch*. The only difference

• difference between that case and this is, that there, the estate is given over upon an indefinite failure of issue at her death.

In this case, if it was only an estate for life in the daughter, such life estate must be forfeited by the common recovery.

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For the plaintiff it was now insisted, that upon the whole of this will, the intention of the testator was not to give his daughter an *immediate estate tail*, which would have entitled her to suffer a recovery; but to give her an estate *for life only*, with a remainder in tail to her children, provided she had any living at her death; and if none, then to give the estate over to the testator's own heir male, with remainder to his heirs male. For by the subsequent clause, "in case, &c." it is plain that he considered the words "heirs of her body" and children, as synonymous terms: But even if he did not, in providing for the event which has happened of the devisee dying without heirs of her body, he expressly revokes that estate of inheritance. This was manifestly the testator's intention, and therefore the court will give effect to it.

For the defendants, *contra*, it was argued, that by the words "heirs of her body," *Mary* the daughter clearly took an *estate tail* in the first instance; and that even supposing the testator to have used the words heirs of her body and children, as synonymous terms, yet the recovery was well suffered: For a devise to *A.* and her children, she having none born at the time of the devise, is a good estate tail. 6 Co. 17. b. If so, the devise over cannot be an executory devise; for there can be no executory devise after an estate tail: Consequently, if it can take place as a contingent remainder, it shall: and the rule of construction has always been so; that is to say, wherever a contingency is limited to depend upon an estate of freehold which is capable to support a remainder, it shall always be held a contingent remainder, and not an executory devise. 2 Saund. 388. *Purefoy v. Rogers.* 1 Lord Raym. 208. in the case of *Luddington v. Kime.* This is such an estate of freehold in the daughter, as will support a remainder; and therefore by the recovery that remainder is barred.—On the second argument Mr. *Wallace* urged the case of *Fountaine v. Gooch*, 2 Bac. Abr. 59. 60. as expressly in point.

Lord *Mansfield* after stating the case said, the validity of the recovery suffered by *Mary*, depends upon whether she was tenant in tail of that estate, or tenant for life only: And it is necessary for the plaintiff to support, that at the death of the testator, she was (during her own life,) tenant for life only. Now the
estate

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estate is given to her and the *heirs of her body*, which is an estate tail: Nevertheless, the intention of the testator may restrain that estate of inheritance, and confine it to an estate for life only. It is insisted that it was the intention of the testator, that the estate of inheritance should be restrained: but, has the testator said it should be so during her life? No; he has only restrained it upon future contingencies. The first is, the event of her own death; but 'till that contingency happens the inheritance is in her. The second is, upon her leaving no children.

If she was only tenant for life under this devise, there is an end of the title upon the second limitation: Because, in that case, it is a limitation upon a contingent remainder which is void.

Further, supposing her tenant for life only, by suffering this common recovery, she has committed a forfeiture. Who is to enter? The next heir male. Suppose she had lived and had a son afterwards: the next heir male must take place, contrary to the clear intention of the testator in that case.

It is manifest that the intention of the testator was to prevent a common recovery being suffered. But where a testator intends that which by law he cannot do, the law will not allow his intention to take effect. If, therefore, she was tenant in tail to the hour of her death, nothing is so clear, as that all conditions, limited upon such estate tail, are avoided by the common recovery which has been suffered. And we are of opinion that *Mary* had an estate tail.

Per Cur. Judgment for the defendant.

Thursday,
Feb. 11.ATCHESON *versus* EVERITT.

A Quaker's testimony on his affirmation, is admissible in an action of debt on stat. 2 Geo. 2. c. 24. against bribery.

THIS was an action of debt upon the stat. 2 Geo. 2. c. 24. sect. 7. against bribery. Plea, Not guilty. Verdict for the plaintiff.

On behalf of the defendant, it was moved last term, that there might be a new trial; because a *quaker* had been received as a witness on his *affirmation*; and it was objected, that this being a *criminal cause*, his evidence ought not to have been received.

It was argued last term by Mr. *Dunning*, Mr. *Popham*, Mr. *Rooke* and Mr. *Buller* for the plaintiff; and by Mr. *Mansfield* and Mr. *Morris* for the defendant.

Lord *Mansfield* then said, This question is very important, both as to all the Quakers in the kingdom, and to the general administration

stration of justice. I wish, when the stat. 7 & 8 Wm. 3. c. 34. was made, that the affirmation of a Quaker had been put on the same footing as an oath, in all cases whatsoever: And I see no reason against it; for the punishment of the breach of it is the same. But even the indulgence they enjoy under this statute, was obtained with much difficulty and struggle. The legislature formerly looked upon non-conformists as criminal; and Quakers in particular, as obstinate offenders. This only served to increase their number: If they had been let alone, perhaps they would not have come down to these times. The more generous and liberal notions of the present times do not look upon real scruples in the light of an offence. The statute 7 & 8 Wm. 3. c. 34. is, *prima facie*, made in ease of Quakers. Indeed, even at that time, they were safe where the Attorney-General could controul; but they wanted to be secure from the persecution of private individuals. In this act, however, there is an exception to their being admitted as witnesses in *criminal causes*, and serving on juries. The question therefore is, What the statute means by the words "*criminal causes*?" Diligent search has been made by Sir James Burrow, and more so by my brother Aston, for precedents: and I believe they have furnished all the cases that are to be found. The result of those cases is, that the courts of late years have, in favour of the Quakers, relaxed their former severity. Their affirmation has been received in the case of an appointment of overseers. 2 Str. 1,219. So in the case of an attachment against a Quaker himself.

No case has been found in which it has been refused, where the action, though in *form* a *criminal* action, in *substance* is a mere action between *party* and *party*. I thought there was one upon the statute of hue and cry, 27 El. c. 13. but the ground upon which it was refused in that case was, that the Quaker could not lay a foundation for the action without an *affidavit*. *Vide sect. 11.*

In cases, where an action and an indictment both lie for the same act; as in assault, imprisonment, fraud, &c. a Quaker is an admissible witness in the action, though not on the indictment.

There being no case in point, it is a material circumstance, that actions for *penalties*, are to a variety of purposes considered as *civil suits*. They may be amended at common law. To be sure, the action in this case is not only given to recover a penalty, but it is attended likewise with *disabilities*. Therefore, it partakes much of the nature of a criminal cause. Moreover, the offence itself is not merely *malum prohibitum*, by statute, but it

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was indictable at common law. Upon general principles, I think the affirmation of a Quaker ought to be admitted in all cases, as well as the oath of a Jew, or a Gentoo, or of any other person who thinks himself really bound by the mode and form in which he attests. But how the law is in respect of this particular case, I am at present not at all decided in my opinion.

ASTON, Justice.—This action certainly partakes of a *criminal nature*. The crime itself was punishable at common law; and that punishment is now increased by additional penalties and disabilities. I think an affirmation ought really to be put upon the same footing as an oath. But at present there is no authority to decide that this is a case in which it can be so, by law. Therefore I am for time to advise.—The court, next day, ordered this cause and another, viz. *Atcheson v. Gough*, which depended precisely upon the same question, to stand over 'till this term.

Mr. Morris now argued for the defendant. It will be contended that a *Quaker's affirmation* ought in all cases to be received, where the *oath* of another man is received. We are not now in the case of a man who, in conformity to the ceremonies of his own religion, refuses to take the *general oath* prescribed by law: But this is the case of a person who refuses to take any *oath* at all.

Till the statute 7 & 8 Wm. 3. there was no doubt about not receiving a Quaker's affirmation. But that statute, in compliance with the prejudices of this sect, broke in upon the rule of the common law, partly in favour to them, and partly for the general benefit of the subject. At the same time the legislature drew the line, by providing "that nothing should enable the affirmation of a Quaker to be received in any *criminal cause*:" and another stat. 22 Geo. 2. c. 30. sect. 3. says, "in any *criminal case*." But the court has already decided that *cause* and *case* are the same. The question therefore is, Whether the present is a *criminal case* or not? Crimes and punishments are necessary attendants on each other. Punishment is a legal term, and is understood to be in consequence of some offence. The charge against the defendant is a charge of bribery. The statutes upon which the action is brought, treats bribery as an *offence*, throughout, and the person committing it is an *offender*. Consequently it considers bribery as a crime. It will be said, on the contrary, that this action to recover the penalty prescribed by the statute, is merely a civil action. That is not so. For bribery was a crime at common law: and the penalty given by the statute is only part of the fine due at common law to the public

lic in satisfaction of the offence: besides which, the statute inflicts additional pains and penalties which are also incurred by the judgment.

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Secondly. To consider this case upon the statutes of *jeofails*. Though the proceedings in a civil action are amendable at common law, yet this case, more than any other penal action, is not within the statute of *jeofails*: And cited *Moore versus Hussey*. *Hob.* 101. where in an action on stat. *Westminster* 2. c. 35. the Court of *King's Bench* held "that the punishment of two years imprisonment made it a penal action;" and therefore reversed the judgment given in the *Common Pleas* in that case for the plaintiff, "because there were no *plegi de prosequendo* entered."

Thirdly: Upon authorities. A Quaker's testimony is not admissible upon a rule for an information. 2 *Strange* 872. Nor upon rules to answer the matters of an affidavit. 2 *Str.* 946.

With respect to indictments and all prosecutions, which upon the face of them are manifestly criminal suits, there can be no dispute. The question therefore is, Whether it is the *form* alone, or the *substance*, that constitutes a *criminal action*? There are two cases to this purpose: 2 *Str.* 1,219. where a rule for quashing an appointment of overseers was held to be a civil action, and a Quaker's affirmation of service of the rule admitted accordingly. But in 2 *Str.* 856. which was the case of an appeal of murder, though the appellant had a right to release the appellee in every stage of the cause, a Quaker's evidence was rejected, because in substance it was a criminal prosecution. And it matters not whether the offence is of the greatest or least magnitude: If the *end* of the action is *merely damages*, a Quaker's affirmation is admissible: But wherever the end is punishment, as in this case, it is not. As to the case of *Rex versus Bell, Andrews* 200. and *Rex versus Chamberlayne* there cited, they neither of them came up to this case. Here the penalty is not given as damages, but as part of the punishment: But if it were, still this is a criminal action in respect of the additional pains and disabilities incurred by the judgment. And this is an answer to the objection, that if the party were arrested and imprisoned for the penalty, so much does the action partake of a civil suit, that the defendant might be discharged under an act of insolvency: But supposing he could be so discharged, the insolvent act could not remove the further pains and disabilities.

Therefore, both upon the reason of the thing, and the authorities in the books, this is a *criminal action*, and consequently a Quaker's affirmation is not admissible.

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Mr. Rooke *contra* for the plaintiff. The inclination of the court will be to receive this testimony: The Quakers' objection to taking an oath is founded on real scruples of conscience; why should not their religious prejudices be indulged as well as those of a Jew or a Mahometan; yet the testimony of these last is received even in criminal cases. I do not contend, that a Quaker's testimony can be received in this country in criminal cases; but I contend that *this* is not a criminal case; and that in all cases which are not strictly criminal, our magistrates will be inclined to receive it. The question must be decided by the words of the statute 7 & 8 W. 3. c. 34. The preamble is, "to relieve Quakers from prosecutions of contempt for not taking oaths when lawfully required." The statute allows them to make affirmation instead of taking an oath; but it provides, that their affirmation shall not be received in *criminal causes*. The general object of the statute seems to have been, to take these sectaries out of the hands of private subjects, and to leave them wholly to the discretion of the crown. In civil suits, the subject may sue out an attachment of contempt, or may bring an action against any one who refuses to obey a *subpœna*; but where the King's name is used, the Attorney-General can stop the prosecution. In this case, therefore, I am rather of counsel for the whole body of Quakers, than for the plaintiff in the present action; for, if their affirmation is not admissible, they are, in such cases as the present, open to all the persecution they suffered before the stat. 7 & 8 Wm. 3. c. 34. was made for their relief.

The great question is, Is this a criminal cause? The criterion of distinction between a criminal and a civil cause is, the *form* of the proceeding, not the offence which occasions it. An assault and nuisance may be prosecuted either by action or by indictment; in the one case, a quaker's affirmation may be received; in the other, not. The offence of bribery may be prosecuted either by action or indictment. The plaintiff has chosen to prosecute by action, and in so doing he has proceeded civilly, not criminally. This cause is in its form an action of debt for a special cause, at the suit of a private subject. The plaintiff does not sue *tam pro rege quam pro seipso*: He sues in his own name only, and recovers the whole penalty. The declaration states, that the defendant owes the money; and that though often requested, he refuses to pay. The ground of complaint is, the non-payment of a debt. The action is founded upon that implied contract, which every subject enters into with the state to observe its laws. 3 Black. Com.

Com. 158. The plea is, *nil debet*; not that the defendant is not guilty. The judgment is to recover the debt; and the party imprisoned for non-payment may have the benefit of the insolvent act. Thus far, then, the whole is merely a civil proceeding. But it is said, there is a disability incurred by the judgment, and therefore it is a *criminal proceeding*. To this it may be answered, that the disability is no part of the judgment, but only a consequence of it: That the form of the proceeding is not affected by it; that the being restrained from suing for a debt beyond time of limitation, is as much a disability, as the being restrained from voting; yet there is no doubt but that a Quaker may give evidence to prove a debt to be above six years' standing. The legislature could not mean to exclude a Quaker's testimony in such a case; for then the offence might frequently be committed with impunity. A Quaker may vote; must affirm against bribery: He may be solicited, bribed, and prosecuted for perjury. Ought not all these statutes to be taken *in pari materia*? If by his affirmation he can claim to vote, and clear himself from the imputation of bribery, ought he not to be trusted as a credible witness to prove bribery in others?

As to authorities, there are none which say that this testimony ought not to be received, in a case like the present. The case of the *King against Bell, Andr. 200*, and the cases there cited, are none of them in point against us; and they shew the strong inclination of Lord *Hardwicke's* mind to receive the affidavits which were objected to. But the case of *Middleten* against Sir *Watkyn Williams Wynne*, is in point to shew that this is not a criminal cause. That was an action brought by Sir *Watkyn* against Mr. *Middleten* on the *stat. 7 and 8 Wm. 3. c. 7.* for double damages for a false return. Sir *W.* had a verdict and judgment. Mr. *Middleten* brought error; and one error assigned was, that the judgment concludes the defendant is *in misericordia*, instead of awarding a *capiatur*. And that this being an action on a *penal statute*, was not aided by the statute of *jeofails*. Lord Chief Justice *Willes*, in delivering the opinion of the judges in the Exchequer chamber, says, "they are not agreed whether the judgment is right or wrong, but they are all agreed, that if it is wrong, it is aided by the statutes of *jeofails*. It is true, the statute 4 G. 2. c. 26. excepts criminal cases from the statutes of *jeofails*; but whether this statute 7 and 8 W. 3. be penal or remedial, as this is not a criminal prosecution, the objection is aided." This is in point to shew the present is not a criminal prosecution; therefore, the evidence was properly received.

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Lord MANSFIELD.—When this case was argued before, I was desirous, for many reasons, that the question should be very fully considered, all the cases looked into, and solemnly argued again. I think it of the utmost importance, that all the consequences of the act of toleration should be pursued with the greatest liberality, in case of the scrupulous consciences of dissenters on the one hand; but so as those scruples of conscience should not be prejudicial to the rest of the king's subjects. For a scruple of conscience entitles a party to indulgence and protection, so far as not to suffer for it; but it is of consequence that the subject should not suffer too.

I have been furnished with a great number of cases, which have passed in this court, upon motions for attachments and other collateral matters, where the affirmations of Quakers have been refused. But these seem all to have arisen from the hasty decision of a case of *Hinton v. Byron**, 11 Wm. 3. (cited in *Rex versus Bell*) where, on a motion for an attachment, the affidavit in support of the application, was by a Quaker on his affirmation. Barely upon that, the attachment was objected to, and not a word was said in support of it: but for a good reason:—The moment the objection was made, the Quaker took the oath, or was ready to have taken it, and so the objection was not insisted on. And yet, it is remarkable, that the memory of these cases has run through all the rest, introduced very great confusion, and not one of the authorities seems to have been argued or considered upon the act of parliament itself. But the present is not a case of that sort. This is the case of evidence offered at a trial in open court.

This sect sprung up during the troubles, and was found at the restoration, with many other sects of non-conformists equally scrupulous. At that time, the law considered their scruples of conscience as a crime; and therefore, they were not allowed to be set up as an excuse or justification of another offence. Therefore, when a Quaker, who was subpoenaed to give evidence, absented himself, and an attachment issued in consequence of it, he could not in excuse say, that his conscience prevented him from giving evidence; for that was a crime. So in the case of interrogatories. The consequence was, he was obliged to answer, or be committed to prison; and if his obstinacy continued, he lay there for life.

The experience of eight-and-twenty years from the restoration to the time of the revolution, shewed that this obstinacy was not

* The case of *Hinton v. Byron* is not mentioned in the printed report of *Rex v. Bell, Andrews*, 200.

merely a pretence or colour given to right and wrong; but that it was a *SCRUPLE*; and that the sect was ready to go through all kind of suffering in the pertinacious adherence to it.

A more liberal way of thinking prevailed after the revolution*. The principles of toleration were explained and justified in consequence of the writings of Mr. *Locke*, Lord *Somers*, and other great men of those times: And a statute passed, which, though not general, was very extensive in the relief it afforded to scrupulous consciences. That statute was 1 *Wm. & Mar. c. 18*. commonly called the *Toleration Act*.

In the *tenth* section of that statute, the legislature takes notice that there was a sect called *Quakers*, who had religious principles, in which they differed from the established doctrine of the church of *England*; and that one of their religious scruples was, the taking an oath according to the form prescribed by the law of *England* to Christians: and therefore, the act enables them to give assurance of their fidelity and allegiance to the state, by what I may call *another form of oath*; because it is appealing to the Deity for the veracity of what they shall say, and invoking his vengeance if they utter what is false.—This statute was followed about six years after by another statute 7 & 8 *Wm. 3. c. 34*. which allows a *Quaker* to *affirm* in cases where *other persons* are required to take an *oath*. But though the legislature had taken notice that they ought not to be punished so far as barely their own opinion and scruples went; yet they did not extend the indulgence so as to let it operate in prejudice to the rights of other persons. It is much, that even at that time they were not permitted to give evidence in this form in all cases *whatsoever*. (I will state the reasons of it by and bye.) It has been truly said, that since the case of *Omichund versus Barker**, and another case of great authority determined since, the nature of an appeal to heaven, which ought to be received as a full sanction to evidence, has been more fully understood. I there argued, and the judges in delivering their opinions agreed, that upon the principles of the common law, there is no particular form essential to an oath to be taken by a witness: But as the purpose of it is to bind his conscience, every man of every religion should be bound by that form which he himself thinks will bind his own conscience most. Therefore, though the Christian oath was settled in very early times, yet *Jews*, before the 18th of *Edward the First*, when they were expelled the kingdom, were permitted to give evidence at common law; and were sworn, not on the Evangelists, but on the Old Tes-

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273. 276.* In *Cane*.
Micb. 1744.
1 *Atkins* 23.

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tament. No distinction was taken between their swearing in a civil or in a criminal case.

Since the case of *Omicund* versus *Barker*, a question was referred to all the judges of *England*, whether a *Turk* should be permitted to swear on the *Alcoran* in a prosecution for a capital offence at the *Old Bailey*; and they were all unanimously of opinion that he might.

It is objected, that the *Quakers* are the only people in the world who ever refused to swear; but in *substance* their affirmation is the same thing; The *form* only is different; for an affirmation is a most solemn appeal and attestation to God of the truth.

There is a remarkable case reported in 2 *Sid.* 6. where Dr. *Owen*, Vice Chancellor of *Oxford*, in the year 1657, being called as a witness, refused to kiss the book; but desired it might be opened before him, and he lifted up his right hand. The jury prayed the opinion of the court, if they ought to give the same credit to him as to a witness sworn in the usual manner; and *Glynn* Chief Justice told them, that in his opinion he had taken as strong an oath as any other witness: but, said he, "if I were "to be sworn, I would kiss the book."

There is a sect in *Scotland* who hold it to be idolatry at this day to kiss the book: But their own form of swearing is much more solemn. At *Carlisle*, in the year 1745, upon a prosecution of some of the rebels, there was no evidence but of this sect, who would not kiss the book; and a case was sent up for advice, whether they could be received as witnesses. It was the opinion of those who were consulted here, that the evidence might be received; but it was not an object, and the prosecution went no further.

With regard to the exception against the testimony of *Quakers* in criminal prosecutions, it was occasioned by a strong prejudice in the minds of the great men who passed the *stat.* 7 & 8 *Wm.* 3. c. 34. I have looked into the debates of those days, and find that every step and clause of the act was fought hard in the House of Commons, and carried by small majorities. I know not whether the exception came in by way of amendment, but I think it did. It was first a temporary act, for seven years only. By *stat.* 13 *Wm.* 3. c. 4. it was continued for eleven years; and in the year 1713 there was an application to the House of Commons to make it perpetual, but it was rejected. An application was afterwards made to the House of Lords, who passed the bill, and it went down to the House of Commons; but they would not give it even a first reading

ing. The whole history of the act may be seen in a very incorrect work, which never received the author's finishing hand: I mean Dr. *Swift's* four last years of *Queen Anne*; and it is observable that Dr. *Swift* commends the House of Commons for the opposition they gave to the act.

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On the accession of the present family to the throne, it was made perpetual, by *stat. 1 Geo. 1. st. 2. c. 6.* But the exception still remained in criminal cases or criminal causes: and it is extraordinary, that though many alterations were made in it by *stat. 8 Geo. 1. c. 6.* yet no variation was made as to this particular; which in some instances bears hard upon the Quakers, and leaves them in a worse condition than they were when their sect first arose. For before the *stat. 7 & 8 Wm. 3. c. 34.* if a Quaker were indicted for a capital offence, he might call Quakers as witnesses in his defence, and that without oath; for formerly the prisoner's witnesses were not sworn. But now by *stat. 1 Ann. st. 2. c. 9. sect. 3.* all persons examined in criminal cases must be examined on oath, both for and against the crown; therefore, if a Quaker be indicted, he cannot have the benefit of Quaker testimony.

It is not possible to say why the exception was made; but it is made, and must be followed.

The effect, however, is, that it is an exception not to be extended by equity. In remedial cases, the construction of statutes is extended to other cases within the reason or the rule of them. But where it is a hard positive law, and the reason is not very plainly to be seen, it ought not to be extended by construction.

We come then to this question: Is the present a *criminal cause*? A Quaker appears, and offers himself as a witness; can he give evidence without being sworn? If it is a *criminal case*, he must be sworn, or he cannot give evidence.

Now there is no distinction better known, than the distinction between *civil* and *criminal law*; or between *criminal prosecutions* and *civil actions*.

Mr. Justice *Blackstone*, and all modern and ancient writers upon the subject distinguish between them. *Penal* actions were never yet put under the head of criminal law, or crimes. The construction of the statute must be extended by equity to make this a *criminal cause*. It is as much a *civil* action, as an action for money had and received. The legislature, when they excepted to the evidence of Quakers in *criminal* causes, must be understood to mean causes *technically* criminal; and a different construction would not only be injurious to Quakers, but prejudicial to the rest of the King's subjects who may want their testimony. The

Penal ac-
tions are
civil suits.

1776. *case mentioned by Mr. Rooke of Sir Watkyn Williams Wynne versus Middleton**, is a very full authority, and alone sufficient to warrant the distinction between civil and criminal proceedings. In that case the question was, Whether the *stat. 7 & 8 Wm. 3. c. 7.* was penal or remedial? The court held "it was not a penal statute. But "supposing it was to be considered as a penal statute, yet it was "also a *remedial law*; and therefore the objection taken was cured "by *stat. 16 & 17 Car. 2. c. 8.*" Now the words of exception in that statute, and also in *stat. 32 Hen. 8. c. 30.* and in *stat. 18 Eliz. c. 14.* are "*penal actions and criminal proceedings.*" But Lord Chief Justice *Willes*, in delivering the solemn judgment of the court, says, there is another act which would decide of itself, if considered in the light of a new law, or as an interpretation of what was meant by penal actions in the *stat. 16 & 17 Car. 2. c. 8.* This is the statute of *jeofails 4 Geo. 2. c. 26.* for turning all law proceedings into *English*, and it has this remarkable conclusion, "that every statute of *jeofails* shall extend to *all forms and proceedings in English* (except in *criminal cases*); and that this "clause shall be construed in the most beneficial manner." This is very decisive.

No authority whatever has been mentioned on the other side, nor any case cited where it has been held that a *penal action* is a *criminal case*; and perhaps the point was never before doubted. The single authority mentioned against receiving the evidence of the Quaker in this case is, an appeal of murder †. But that is only a different mode of prosecuting an offender to death. Instead of proceeding by indictment in the usual way, it allows the relation to carry on the prosecution for the purpose of attaining the same end, which the King's prosecution would have had if the offender had been convicted, namely, *execution*: and therefore, the writers on the law of *England* class an appeal of murder in the books under the head of criminal cases.

With regard to cases that have been cited as happening here, it is astonishing that it ever should have been doubted after the act of toleration, and after the *stat. 7 & 8 Wm. 3. c. 34.* when an attachment was moved for against a Quaker, whether or no he should be at liberty to give an answer on his solemn affirmation, without being obliged to take an oath. But it is true that it was doubted three times in Lord *Hardwicke's* time, and never resolved ‡; for the court avoided the question by discharging the rule upon some other matter. I consider it, that as to his own answers, he is a good witness; for after the act of toleration, it was settled in the case of *Sir Thomas Har-*

rison,

ATCHESON
versus
EVERITT.
* *Vide* 1
Wils. 125.
2 *Str.* 1227.

† 2 *Str.*
856.

‡ *Rex v.*
Bell, An-
drews 200.

rison, Chamberlain of the city of London, versus *Evans*, pursuant to the opinion of all the judges except one, "that a *dissenter* from "the Church of *England* is not guilty of a crime, barely by having that *religious opinion*."

1776.

ATCHESON
versus
EVERITT.

Quakers,

* The particulars of that case were as follow: *Harrison* levied a plaint in the sheriff's court of the city of London against *Evans* in a plea of debt for six hundred pounds, for not serving the office of sheriff, having been duly nominated, elected into and publicly called upon to give his consent to take upon him the said office pursuant to the charter of King *John*, the acts of the Common Council, &c. The defendant pleaded *first*, the corporation act, 13 Car. 2. §. 2. c. 1. *sect.* 12. by which it is enacted, "That no person shall be elected into any office, or place in "the act mentioned concerning the government of any corporation, who shall not "within one year before his election have received the sacrament of the Lord's "Supper according to the rites of the church of *England*, and have taken the oaths "of allegiance and supremacy, and subscribed the declaration in the said act specified: And in default thereof, every such placing, election and choice, is declared to be void." The defendant further pleaded the toleration act, 1 Wm. and Mar. c. 18. and then pleaded in substance and to the effect following: That the office of sheriffs of London is an office to which the provision of the stat. 13 Car. 2. §. 2. c. 1. extends; that he is, and was at the time of the pretended election of him to the said office, a *Protestant dissenter*, qualified agreeably to the terms of the stat. 1 Wm. and Mar. c. 18. and that he had not, within one year next before the said pretended election, taken the sacrament of the Lord's Supper according to the rites of the Church of *England*, nor had ever, or could he in conscience take the same, and that he was not bound by law to take the same, of which the Liverymen of the city had due notice at and before the time of the election; and by reason of the premises, &c. the said liverymen were prohibited from electing him to the said office; and the said defendant was disabled, and utterly incapable of being elected to be one of the sheriffs of the said city of London, and thereby the said supposed election was void. The plaintiff in his replication set forth the stat. 5 Geo. 1. c. 6. *sect.* 1. for quieting and establishing corporations, by which it is enacted, "That all persons actually in the "possession of any office, and who are required by stat. 13 Car. 2. §. 2. c. 1. to "take the sacrament of the Lord's Supper according to the rites of the church of "England within one year, &c. shall be confirmed in their respective offices, notwithstanding their omission to take the sacrament as aforesaid, and shall be indemnified from all incapacities," &c.

To this replication the defendant demurred. The plaintiff joined in demurrer, and, on argument in the sheriff's court, judgment was given on the demurrer for the plaintiff. The defendant brought a writ of error returnable in the court of hustings of *Common Pleas* in the city of London, assigned the general errors, and the plaintiff rejoined there was no error: The court of hustings affirmed the judgment. Upon which the defendant obtained a special commission of errors directed to Sir *John Willes*, Chief Justice of the C. B. Sir *Thomas Parker*, Chief Baron, Sir *Michael Foster*, Justice of R. B. The Honourable *Henry Bathurst*, Justice, C. B., and Sir *Eardly Wilmut*, Justice of R. B., or any two of them, to inspect the said judgment and affirmance thereof at *Guildhall*. After three solemn arguments before the Judges, in the said commission named, on the 5th of July 1762, the said several judgments of the sheriff's court, and the court of hustings, were reversed by the

1776.

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versus
EVERITT.

Quakers, therefore, since that act, are not in the eye of the law guilty of a crime by saying that sincerely they cannot swear according to our form of oath. It is a fair excuse for them, and a reason for dispensing with the usual form; otherwise by reason of their scruples they would be imprisoned for life; for you cannot take their answer upon interrogatories.

Neither of the acts dispense with a Quaker's giving evidence in a criminal case; and an attachment will go upon refusal. But he might now say the toleration acts indemnify me, and take notice of my scruples.

It is remarkable that the stat. 7 & 8 Wm. 3. c. 34. in the first section, gives Quakers a right to affirm in *all cases* whatever where another man may take an oath. This is general; and it is inserted by way of *exception* only that he shall *not* be admitted in a *criminal cause*. It is a purgation of himself not giving evidence when he is to answer interrogatories.

• 2 Str.
1319.

In the case of *Rex versus Turner* * on a motion to quash an appointment of overseers, the court said, though the prosecution is in the King's name, the *end* of it is a *civil remedy*, and very properly allowed the Quaker's affirmation to be read.

It is extraordinary, that upon all the cases of attachment not one was argued upon the ground of its being a *criminal case*; and to be sure the exception might as well hold on an affirmation taken to hold to bail; because it deprives a man of his liberty. The very last attachment for non-performance of an award was obtained in this court upon a Quaker's affirmation, and not a word said by way of objection to it. That was the case of *Taylor versus Scott*.

the *unanimous* opinion of all the Judges, in the said commission then surviving, Lord Chief Justice *Willes* being before that time dead.

The plaintiff afterwards brought a writ of error returnable in Parliament, which was argued by Mr. *Charles Yorke*, and Mr. *Norton* for the plaintiff; and by Mr. *De Grey* and Mr. *Willes* for the defendant: And on *February* 4th 1767, council having been fully heard, the following question was put to the judges: "Whether, upon the facts admitted by the pleadings in the cause, the defendant is at liberty or should be allowed to object to the validity of his election on account of his not having taken the sacrament according to the rites of the church of *England*, within a year before, in bar of this action?"

* Mr. Ba.
ron Perrott.

The Judges differing in opinion were heard *seriatim*: Six of the Judges present delivered their opinions with their reasons in the *affirmative*; and the remaining Judge * present delivered his opinion with his reasons in the *negative*. Whereupon it was ordered and adjudged that the *judgment* given by the *commissioners delegates*, reversing the judgments given by the sheriff's court, and court of *huitings*, be *affirmed*.

We

We are not under the least embarrassment in the present case: 1776.
for there is not a single authority to prove, that upon a penal ac-
tion a Quaker's evidence may not be received upon his affirm-
ation. Therefore, I am of opinion that Mr. Justice Nares did
perfectly right in admitting this Quaker to be a witness upon his
affirmation; and consequently that the rule for a new trial
should be discharged.

The three other Judges concurred.

Rule discharged.

Mr. *Rooke* mentioned that in *Co. Litt.* 284 and 287, the writ
of *appeal* is ranked under *placita criminalia*.

ATCHESON
versus
EVERITT.

BEXWELL versus CHRISTIE.

Saturday,
Feb. 3d.

THIS was an action on the case, brought by the plain-
tiff against the defendant an auctioneer, and so stated to
be by profession in the declaration, for carelessly and negligently
selling the plaintiff's gelding, which he had directions not to
let go under 15 *l.* for a less sum, viz. 6 *l.* 16 *s.* 6 *d.* contrary to
such directions, and contrary to his undertaking not to sell it
under the said sum of 15 *l.* Plea not guilty. Verdict for the
plaintiff, subject to the opinion of the court upon this question;
Whether, under the circumstances of this case, the auctioneer was
bound to bid for and buy in the horse, if no one bid to the
amount of 15 *l.* for it? The case at the trial appeared to be,
that the auction at which the horse was sold, purported to be "a
sale of goods and effects of a gentleman deceased, at his house
in the country, by order of the executor."—The horse was not
mentioned in the catalogue; but was sent by the plaintiff to be
sold, with a written order not to let him go under 15 *l.* and the
plaintiff had no other connexion with the sale. The conditions
of sale were "that the goods should be sold to the best bidder."
Lord *Mansfield* upon reporting the case said, that the practice at
auctions of owners buying in their own goods, struck him as a
fraud upon the public; and that the nature of these sales re-
quired the goods should go to the best *real* bidder.

Mr. *Mansfield* and Mr. *Morgan* for the plaintiff insisted, that
the defendant ought to have obeyed his instructions, and not to
have let the horse go under the 15 *l.* That by taking the horse
from the plaintiff's servant and putting him up to auction, he had
engaged not to sell it for less than 15 *l.* and, therefore, his doing

Action does
not lie a-
gainst an
auctioneer
for selling
a horse at
the highest
price bid
for him,
contrary to
the owner's
express di-
rections not
to let him
go under a
larger sum
named.
Otherwise,
if the own-
er had di-
rected the
auctioneer
to set the
horse up at
such a par-
ticular
price; and
not lower.

177.
BREWELL
v. JAMES
CARPENTER.

so was a fraud upon the plaintiff, who would not have left the horse with the defendant, much less have had it put up to sale at all, if he had not understood the defendant meant to comply with his directions, and that it was legal for him so to do. That this was the practice at all auctions; consequently, if an universal practice, could be no fraud on any body. But in fact, this was no more than a direction to set the horse up at that price, and that there should be no bidding under.

Mr. *Wallace* and Mr. *Dunning* for the defendant insisted, that it would have been a fraud upon the sale if the auctioneer had bid or provided a bidder to puff this particular lot or any other lot in the sale; and, therefore, the action could not be maintained.

LORD MANSFIELD.—The matter in question is in itself of small value; but in respect of the principles by which it must be governed, it is a question of great importance. Since the trial I have mooted the point with many who are not lawyers, upon the morality and rectitude of the transaction. The question is, Whether a bidding by the owner of goods at a sale under these conditions, namely, “that the highest bidder shall be the purchaser, and if a dispute arise, to be decided by a majority of the persons present,” is a bidding within the meaning of such conditions of sale?

There is no express undertaking on the part of the defendant, nor is it, as has been ingeniously said, a direction that there should be no bidding under 15 *l.* which might be fair: But the direction given to the defendant is, “not to let the horse go under 15 *l.*,” which implies there might be a bidding under that sum. The question then is, Whether the owner can *privately* employ another person to bid for him?—The basis of all dealings ought to be good faith; so, more especially in these transactions, where the public are brought together upon a confidence that the articles set up to sale will be disposed of to the highest real bidder: that could never be the case, if the owner might secretly and privately enhance the price, by a person employed for that purpose; yet tricks and practices of this kind daily increase, and grow so frequent, that good men give into the ways of the bad and dishonest in their own defence. But such a practice was never openly avowed. An owner of goods set up to sale at an auction never yet bid in the room for himself. If such a practice were allowed, no one would bid. It is a fraud upon the sale, and upon the public. The disallowing it is no hardship

hardship upon the owner. For if he is unwilling his goods should go at an under price, he may order them to be set up at his own price, and not lower: Such a direction would be fair: Or he might do as was done by Lord *Asburnham*, who sold a large estate by auction; he had it inserted in the conditions of sale, that he himself might bid once in the course of the sale: and he bid at once 15,000 or 20,000 *l.* Such a condition is fair; because the public are then apprised, and know upon what terms they bid.—In *Holland* it is the practice to bid downwards.

1776.

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versus
CHRISTIE.

The question then is, is such a bidding fair? If not, it is no argument to say it is a frequent custom: Gaming, stock-jobbing and swindling, are frequent. But the law forbids them all. Suppose there was an agreement to abate so much; which is the case where goods are sold by one person in the trade to another: they abate sometimes 10 or 15 *per cent.* Such an agreement between the owner and a bidder, at a sale by action, would be a gross fraud. What is the nature of a sale by action? It is, that the goods shall go to the highest real bidder. But there would be an end of that, if the owner might privately bid upon his own goods. There is no contract with the auctioneer. He is only an agent between the buyer and seller. He may fairly bid for a third person who employs him, but not for the owner.

In this case, there is another fraud put upon the public. For by the catalogue the goods are described to be “the goods of a gentleman deceased, and sold by order of the executor.” Upon this representation, many people would attend to bid, on a supposition that the goods were necessarily to be sold at all events, whether valuable or not valuable; whereas they might have their suspicions if they were the property of persons living. Horses, or any other species of property, belonging to persons that are dead, are not so likely to be faulty as those which are parted with by persons in their life-time.

We all remember the sale of a gentleman's wines*, where vast quantities had been sent in belonging to other persons: And all sold at a very high price, under an idea they were his. The consequence was, most of the buyers were taken in. * Mr. Bradshaw's.

Therefore, upon full consideration, I am of opinion, that a bidding by the owner in the manner contended for, and agreeable to the directions given in this case, would have been a fraud upon the sale: And consequently, that this action against the defendant as auctioneer, cannot be maintained.

ASTON, Justice — I am of the same opinion. The directions in this case are neither agreeable to the catalogue or the conditions.

Mr.

1776. Mr. Justice *Willes* and Mr. Justice *Ashurst* were of the same opinion.

BREXWELL
versus
CHRISTIE. *Per Cur.*—Rule for a new trial without costs, altered to a nonsuit without costs.

Vide stat. 17 Geo. 3. c. 50. sect. 10. and stat. 19 Geo. 3. c. 56. sect. 12.

Howard v. Castle, 6 T. R. 642.

Same day.

ALEXANDER *versus* VAUGHAN.

One who has traded to England, whether native, denizen, or alien, tho' never a resident trader in England, but who comes over here occasionally, and commits an act of bankruptcy, is an object of the bankrupt laws.

THIS was an action of trespass against the messenger to a commission of bankruptcy for seizing the books, papers, and bills of exchange of the plaintiff.

The defendant pleaded, *1st*, The general issue; *2dly*, A justification under the statute 13 *Eliz. c. 3.*; *3dly*, A justification under a commission of bankruptcy issued against the plaintiff, setting forth the proceedings at large.—To the *last* plea, the plaintiff *replied*, that he was not a *merchant and trader*, and a person within the description of the bankrupt laws.

At the trial before Lord *Mansfield* at the sittings after *Michaelmas* term, 1775, at *Westminster*, a general verdict was found for the plaintiff.

Upon a motion by Mr. *Wallace* for a new trial, Lord *Mansfield* reported the case shortly thus :

Alexander, the plaintiff, who was a native of *Scotland*, resided there, and had a great house of trade at *Edinburgh* : besides that business, he was concerned as partner with *Bell and Company* in a great brewery. In both characters he might be considered as one of the greatest traders in *Europe*, and he traded to all parts of the world. He comes to *England*, and being there *occasionally*, is arrested, and lies in prison *two* months, which is an act of bankruptcy.

The question is, Whether by the *English* statutes against bankrupts, a person, to come within the meaning and description of a trader there named, must not be a *resident* trader ; that is, Whether, as the act of bankruptcy must be *local*, in *England*, the trading should not be so likewise ? or, Whether such a person as the plaintiff, coming *occasionally* to *England*, is liable to the *English* laws against bankrupts ?

This is the general question.—But the defendant insists, that be the general question as it may, the plaintiff in fact traded in *England* after his coming here, and several instances were given in evidence

evidence at the trial, and left to the jury. But they are not necessary to be moved till the court has decided the first point; therefore let the rule be, to shew cause why a nonsuit should not be entered, with liberty to move for a new trial, if the court should be of opinion with the plaintiff.

Mr. *Dunning*, Mr. *Davenport*, and Mr. *Lucas* now shewed cause.

The general question is, Whether a *Scotch* trader, occasionally coming to *England*, and committing an act of bankruptcy, is entitled to the benefit of the laws against bankrupts in *England*? They argued he was not. That the description of persons who may become bankrupt by the statute 13 *El. c. 7. stat. 1 Jac. 1. c. 15.* and *stat. 21 Jac. 1. c. 19.* is, "merchants or other persons using the trade of merchandize, &c. being subjects born of this realm or denizens." That one of the acts of bankruptcy specified by the statutes, is "departing the realm," which cannot be said of a foreigner. That a *Scotchman*, since the union, is as much a foreigner in respect of these statutes, which do not extend to *Scotland*, as any other alien; and therefore to say, that from the circumstance of the plaintiff's trading to *England*, the bankrupt laws upon his arrival here immediately attach upon him, would be to make the bankrupt laws binding upon all the world. Such a construction would also be attended with the most mischievous consequences, as it would be an encouragement to indigent foreigners to resort to this country, merely for the purpose of clearing themselves by a commission, and highly injurious to their creditors, who might not even have notice of it till after the certificate was obtained.

Mr. *Wallace*, *contra*, for the defendant, insisted that the plaintiff was an object of the bankrupt laws. That by *stat. 21 Jac. 1. c. 19. sect. 15.* "Strangers, as well as natural-born subjects and denizens are expressly made liable to the bankrupt laws." A man born here, and established in a foreign country in trade, coming over here, is liable to a commission. An alien coming here is liable to be arrested, and to all demands of creditors. He may assign all his effects for the benefit of his creditors, and there is no distinction between *Scotch*, *Irish*, *Dutch*, *French*, or any other alien. He cited *ex parte Smith*, from Mr. *Philip Carteret Webb's* notes, before Lord *Hardwicke*, 23d December 1737. "John *Asb-ley* went from *England* in 1720, and resided in *Barbadoes* till 1735, where he was a factor, and planter, and traded to *England*, by sending goods from his plantations, and receiving goods back again bought in *England*; and disposed of goods, sent from
" *England*

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ANDER
versus
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1776. " *England to Barbadoes*, for merchants in *England* as a factor;
 " and being greatly indebted, came to *England* in *April 1737*;
 " and committing an act of bankruptcy, a commission issued:"
 Upon a question, Whether he was within the statutes of bankrupts, the case of *Sedgewick versus Bird*, 1 *Salk.* 110. *Dodsworth versus Anderson*, 2 *Jones*, 141, 142. and *Raym.* 175. S. C. were there cited. Lord *Hardwicke* said—" If this point had not been
 " decided in *Sedgewick's* case he should have doubted; but as it
 " was there decided, he held himself bound by that determination."
 "—This doctrine was again recognized by Lord *Hardwicke* in a case *ex parte Williamson*, 2 *Vez.* 249. 252. and 1 *Atk.* 82. S. C. In this latter case Lord *Hardwicke* treated it as a settled point, that a trader abroad, who has traded to *England*, coming over here, is an object of the bankrupt laws: his only doubt was, whether there was not some collusion.—But it is clear there can be no collusion in this case, because the plaintiff himself disputes the commission.

Mr. *Mansfield* was going to argue on the same side; but Lord *Mansfield* stopped him, saying, he had rather hear what answer could be given to the authorities cited, and whether the court was not bound down by them.

Mr. *Dunning* and Mr. *Davenport* in reply, said, that as to the case of *Sedgewick versus Bird*, the matter did not undergo a discussion before the court upon argument, but was only held so on a trial at bar; which, in fact, was not of much higher authority than an opinion at *nisi prius*. And therefore it was more than probable, that the court did not, at the time, weigh the extensive bad consequences attending such a determination. That that case, like the others, was most probably the case of an *Englishman* returning from abroad hither. That as to the cases of *Ashley* and *Williamson*, they both submitted to the commission; and, therefore, it was but reasonable that the creditors abroad should have time to come in and prove their debts. They again insisted, that an actual residence in *England* was necessary to subject a man to the bankrupt laws, and that the particular act of bankruptcy described in the statutes of " *departing the realm*," must mean a departing from the bankrupt's home; but it could never be said that a person *not resident* in *England*, departed from *England* as his home; much less could it be said of a *foreigner*, who had never before been in *England* in his life.

LORD MANSFIELD.—There have been many things said at the bar which have nothing to do with the question now before the court.

1st, With what view the commission was taken out? 2^dy, With what

what view the plaintiff lay in prison, or why he now opposes the commission. 3dly, To what amount the plaintiff traded in *England*. 4thly, The instances of his trading in *England*. All these are out of the question. For supposing the general question to be with the plaintiff, I left the instances of trading to the jury, who thought they were not sufficient proof of the plaintiff's having traded in *England*, and as to that point, I gave the defendant leave to move for a new trial. The time of the plaintiff's being in *England* is also immaterial.

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The case is simply this; a merchant who has traded to *England*, but who is a native of, and constantly resident in, a country not subject to the *English* statutes concerning bankrupts, comes occasionally to *England*, is arrested, and lies in prison two months, which is an act of bankruptcy. The question is, Whether such person, having traded to *England*, not in *England*, is an object of the bankrupt laws?

The circumstance of a trader being a natural born subject, or a foreigner, makes no difference. The last section of *stat. 21 Jac. 1. c. 19.* expressly declares, that "strangers, as well as natural born subjects and denizens, shall be subject to the bankrupt laws;" and therefore it puts that point out of the case. But it still leaves the question, whether both natives and foreigners must not be traders in *England*.

I own, when the general question was started at the trial, I felt great objections, upon principles of justice, to the idea of a foreigner, occasionally coming here, being subject to the bankrupt laws. Whoever gives credit, gives it upon the property a man has in the country where the credit is given. I was also struck with the very inconvenient consequences that might arise in different parts of our dominions, if a trader might come over here behind the back of his creditors, hurry through a commission, and obtain his certificate, before his creditors abroad could even know the commission had issued. On the other hand, it appeared there was a locality in the description of the acts of bankruptcy, and that the trader, whether a native or foreigner, must be in *England* when he commits an act of bankruptcy. Therefore I determined not to give any binding opinion at *nisi prius*.

The case *ex parte Williamson*, 1 *Atk.* 82. did not strike me then, as it does now; for the opinion there given was not an opinion founded on any part of the case before the court. At the same time I never doubted but that many such commissions have issued, and that many persons have come from *Ireland* and the plantations, on purpose to get commissions taken out against them-

1776. ~~selfe~~. I recommended it therefore to the counsel to search for cases decided upon the point. That search has been made, and several authorities have been produced.

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ANDER
versus
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I am confirmed in every objection that arose in my mind upon general principles, by what Lord *Hardwicke* says; but if in the year 1750 he did not think the matter entire, I think it is not so now. However it may stand upon principles, I think we are bound by the authorities. The cases of *Dodsworth versus Anderson*, Sir T. Raym. 375. and *Sedgewick v. Bird*, 1 Salk. 110. are strong authorities upon the subject. The first goes a great way: The court there say, "though it be found that the bankrupt bought and sold but *once in England*, it is *not necessary* that he should do so; for many merchants do only *buy beyond sea*, and *sell here*; it is *trading* that makes a man capable of being a bankrupt, and it is plain that *Grice* did trade *in England*." From what the court had just said before, I take that to mean *to England*.

The case of *Sedgewick versus Bird*, is much stronger: because the bankrupt in that case never did any act of trade *in England*.

But the most material authority of all, is the case *ex parte Smith* in *Canc. Dec.* 25th, 1737, upon the bankruptcy of one *Ashley*, who was never resident *in England*, nor had ever traded *in England*. That case was solemnly argued before Lord *Hardwicke*; and the several cases abovementioned were cited and relied on. The bankrupt came over on purpose to get the commission taken out against him. The opinion given by Lord *Hardwicke* in that case is much stronger, because he had no doubt that the commission was fraudulent; and therefore he gave his opinion both against his inclination, and against what he thought the justice of the case. The words of his opinion are very strong. "The new laws relating to bankrupts have turned the edge of commissions of bankruptcy, from being, as they were *originally*, *remedial* to the creditor, and in the nature of *punishments* to the bankrupt, whom they considered as an offender, to be the accidental occasion of great frauds. This has been the case here, and I will, as far as I can, prevent the extending them to other parts of the world. If the act of bankruptcy had been committed abroad, to be sure no commission ought to go against him for that act. The affidavits speak only of his trading *to England*, while he resided at *Barbadoes*. If this point had not been determined in *Sedgewick's* case, I should have doubted of it; but that case is *in point*, and must govern this. However, I will suspend the allowance of the certificate till the creditors abroad have an opportunity to send over proofs of their debts."

This

This throws a different light upon the case *ex parte Williamson* before Lord *Hardwicke* in the year 1750, which was 13 years afterwards; and shews, that he continued of the same opinion then, though the same point was not immediately in question before him at that time.

Here the plaintiff traded to *England*, and never was a resident trader in *England*, but came hither only *occasionally*. The consequence is, that a nonsuit must be entered.

The other judges concurred.

Per Cur. Verdict set aside, and a nonsuit entered.

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CAMERON *et al.* versus REYNOLDS, Under Sheriff.

Monday,
Feb. 5th.

THIS was a special action on the case, in which the declaration stated, that the plaintiffs had recovered a judgment against one *Fancourt*: That a *fi. fa.* was sued out and delivered to the sheriff, by virtue of which he seized and took goods and chattels to the amount of 90 *l.* 4 *s.* and assigned the goods to one *J. Brown*, in trust for the plaintiffs. That the defendant at that time was *under-sheriff*, and by *virtue of his office* ought to have executed to *J. Brown* a bill of sale of the said goods: That a bill of sale was prepared, and the defendant was requested to sign it, the *sum* and all *fees* being offered to him: That the defendant refused to sign it, and afterwards executed another bill of sale to one *Richard Cavel*, and put him into possession; by means whereof the plaintiffs were put to a great deal of expence in an application to the court of *B. R.* to cancel the said bill of sale to *Cavel*, and in keeping possession pending the application, and in paying warehouse rent. Plea, not guilty. Verdict for the plaintiff. Damages 60 *l.*

All actions for breach of duty of the office of sheriff, must be brought against the *high sheriff*, though by default of the *under sheriff* or *bailiff*.

Cavel took possession, kept it about a month, and received the money in the shop, to the amount of about 20 *l.* After quitting the possession, *Cavel* brought an action against the plaintiffs and their servants, for seizing and taking the goods, and brought an action for keeping possession of the house.

In order to put a stop to these actions, the present plaintiffs obtained a rule for the sheriff to execute a bill of sale to *J. Brown*, and that the bill of sale to *Cavel* should be cancelled: That *Cavel* should account with *Brown* for the money received from the sale of the goods in the shop, and that all further proceedings in the

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actions brought by *Cavel* against the present plaintiffs and one *Alexander Lobban* should be staid.

At the trial, the case made out on the part of the plaintiffs was as follows: The judgment and execution were proved, and that the *fi. fa.* was delivered to the defendant, then the *under-sheriff*, who seized several goods under it; and, upon an application to him for that purpose, promised to execute a bill of sale to the nominee of the plaintiffs, and ordered him to be put into possession. That afterwards a bill of sale was made out for him by order of the defendant, and the usual fees paid. That the defendant was then required to execute it, but he refused, unless the money arising from the sale was paid into his own hands. This the attorney for the plaintiffs refused to comply with; and made application to one of the high sheriffs, offering to pay the money into the hands of a banker. The high sheriff thinking it reasonable, sent a message to the defendant, recommending him to execute the bill of sale, and the plaintiffs then offered to pay the sum for which the goods were sold, and all fees to the defendant. But he absolutely refused to do it, and executed a bill of sale to *Cavel*. The rule of the court of *B. R.* abovementioned was then read, which was not founded upon a motion for an attachment against the defendant personally. or for misbehaviour by him or the sheriff, but was a rule for a specific relief. Then the plaintiffs proved the costs they had been put to in making that application, and their expence in keeping possession of the goods.

Lord *Mansfield*, after reporting the case, said, there were three points saved at the trial. 1st, Whether the action would lie against *Reynolds*, the *under-sheriff*? 2^{dly}, Whether the rule of court was not a bar to the action? 3^{dly}, Whether his lordship did right in leaving the costs to the jury in damages, as *Reynolds* was no party to the rule?

The rule that had been obtained was to shew cause why a nonsuit should not be entered, or why the judgment should not be arrested, or why a new trial should not be granted.

Mr. *Dunning* and Mr. *Buller* now shewed cause; and as to the first question insisted, that though the action might have been brought against the high sheriff, yet it also lay against the under-sheriff, and in this case was properly brought against *him*, because *he only* was in fault. For the high sheriff, when applied to, was of opinion, and desirous the bill of sale should be executed to the plaintiffs, but the defendant refused to execute it.—1 *Roll. Abr.* 94. Pl. 4. “An action lies by the demandant in a writ of en-

“ try

“ try *sur disseisin*, if he pleases, against the under-sheriff, who has received his fee to return a writ of summons, and does not re- turn it”. 1 Leon. 146. pl. 203. S. C. So against the under-bailiff of a liberty, who has levied the debt under a warrant upon a *fi. fa.* for concealing the writ. 1 Ro. Abr. 94. Pl. 5. So against an under-sheriff for proceeding after a *habeas corpus* delivered. *Iplett v. Williams*, 3 Leon. 99. It is clear from these authorities, that the plaintiffs had it in their election to sue *either*; and if so, the court would not in this case make the high sheriff, who has done no fault, liable; and leave him to seek his remedy over against the under-sheriff who was alone in fault.

As to the question, whether a nonsuit should be entered, or the judgment arrested, they insisted, if the objection to the action lay at all, it was upon the face of the record; and therefore, the latter would be the proper rule.

Secondly, Supposing the action well founded, the rule for cancelling the bill of sale to *Cavel* could not be taken into consideration in this action; for it was a rule in another cause, viz. between *Cavel* and the plaintiffs.

Thirdly, The costs were occasioned by the defendant, and therefore ought to be included in damages upon this action; otherwise the plaintiffs would be sufferers.

Mr. Wallace and Mr. Davenport, in support of the rule, contended, that the high sheriff was the person alone responsible to the plaintiffs. The law looks upon him only, and if he is a sufferer by the misconduct of the under-sheriff, or any other of his officers, he has his remedy over against them. They admitted an action lay in the cases cited; but there it was by virtue of the statute of *Westminster* 2. c. 39. and 28 Ed. 1. c. 16. and so it appears in *Dalton's Sheriff*, 483, 4. and *Doctor and Student*, c. 42. But secondly, Supposing the plaintiffs had their election in this case, the rule upon the former application is a complete bar to the action; because under that rule the plaintiffs have already had a specific relief. If so, they cannot have a double recompence for one and the same injury. Thirdly, The rule giving such specific relief being silent as to costs, no action would lie for them; and therefore they ought not to have been considered in damages by the jury. In equity, upon a bill for a specific performance, if the court upon the hearing do not give costs, no action can be maintained for them afterwards. Here the court directed a specific performance; therefore the plaintiffs are not entitled to costs for non-performance too.—*Cur. advisare vult.*

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Lord *Mansfield* the next day, after stating the case, delivered the opinion of the court as follows: The 1st objection is an objection upon the face of the declaration, that this action does not lie against the *under-sheriff*, and therefore that judgment ought to be arrested. As to that, we are all of opinion, the action does not lie against the *under-sheriff*. It is an action brought against him for a breach of duty in the office of sheriff. Wherever that is the case, the action must be brought against the high sheriff, as for an act done by him; and if it proceeds from the default of the *under-sheriff* or bailiff, that is a matter to be settled between them and the high sheriff.

An action does not lie against the sheriff upon a promise to execute a bill of sale to the plaintiff's nominee.

The next objection which arises on the face of the declaration is, that the *gist* of the action is, the defendant's having refused to execute a bill of sale to the *nominee* of the plaintiffs, *contrary* to his *promise* so to do, and in *breach of his office*. As to that, it is no part of the duty of the office of sheriff to execute a bill of sale at an *appraised value*. It might be very inconvenient and highly injurious to defendants if it were. The legal and proper mode of compelling a sale by the sheriff, where he makes delay or refuses, is by writ of *venditioni exponas*; upon which he must return the money into court. But he is not compellable to execute a bill of sale to the plaintiff's nominee, because he has promised to do so. These objections go in arrest of judgment.

A rule of court, giving specific relief, in a case where, by law, the party is not entitled to two different remedies is a bar to an action for the same cause.

Another objection is, supposing the action would well have lain against the defendant, whether or no the plaintiffs have not precluded themselves from bringing this action; having complained against the high sheriff by motion, and upon such motion obtained an adequate recompence by rule of court. As to that point, the case was this; the plaintiffs not having the bill of sale, could not maintain an action against the second vendee for the goods, or for the profits of the shop while he continued possessed: For the same reason, they could not defend themselves against the actions brought by the second vendee against them. Therefore they applied to this court, by motion against the high sheriff, for a rule to shew cause why the bill of sale to *Cavel* should not be cancelled, and a new bill of sale executed to the plaintiffs, upon the ground of the defendant having agreed so to do. All the facts upon which this motion was founded, were acts of the defendant *Reynolds*, which the plaintiffs, in their application to the court, looked upon as the acts of the *high sheriff*, and not as the acts of *Reynolds*. Upon hearing all parties, the court gave the plaintiffs a *specific relief*, by ordering the latter bill of sale to be cancelled, and directing the execution

execution of the former. After that, a man shall never be suffered to pursue a second recompence. Besides, part of the rule of the court upon the application was, that "all further proceedings should be staid." It is not like cases where two different remedies are given by the law: for instance, where an arrest is illegal; for there the court only correct the irregularity, and leave the party to bring his remedy for the false imprisonment, which the court cannot give without consent. But in this case, where the whole proceedings are against the high sheriff, and so considered by the plaintiffs themselves, who make the application to the court, they shall be bound.

I thought yesterday it was material that the defendant was not a party to the rule, but I am satisfied now that there is nothing in that objection.

The question that arises upon these two points, one of which is a ground for arresting the judgment, and the other for a nonsuit, is what the court should do? If we order a nonsuit to be entered, the plaintiff must pay the defendant his costs; but if we arrest the judgment, each party must pay their own costs. Upon the whole, taking all the circumstances and complexion of the case into consideration, we think the defendant ought to prevail upon the motion in arrest of judgment, more especially as it appears upon the declaration that he might have demurred.

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Where a plaintiff is non-suited the defendant is entitled to costs. Where judgment is arrested, each party pays his own costs.

Per Cur. Judgment arrested.

Lord *Mansfield* added, that the proper mode would have been for the defendant to have applied to the court to stay the proceedings in this action.

SAYER *versus* POCOCK.

Tuesday,
Feb. 6.

MR. *Wallace* shewed cause against a rule to amend the record in this case after verdict, by adding the words, "and the defendant does so likewise," at the end of the replication, instead of "*&c.*" A prior motion had been made for a rule to shew cause why the judgment should not be arrested, upon the ground of there being in fact no issue joined, in consequence of the above defect.

Replication amended after verdict, by inserting the *similiter* instead of *&c.*

The action was an action on a sheriff's bond, brought by the plaintiff against his bailiff. Plea, performance of the conditions generally. Replication that one *Groves* recovered judgment in another cause, and that the defendant suffered an escape, by which

1776. attachments issued against the plaintiff. Another breach assigned was in not returning the writ. Upon one breach the defendant let judgment go by default. And on the other, the *similiter* was not added. But upon this, the cause went down to trial, and a defence was made. He cited 1 *Str.* 641. where upon this objection taken it was held not amendable, and the judgment arrested.

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ASTON Justice. There is a case of *Cowper v. Spencer*, 8 *Mod.* 376. where the plaintiff replied *de injuria sua propria*, concluding to the country without any *similiter* added: the court there held it was no issue: but it does not appear in that case, that *absque tali causa* was added; nor that the conclusion to the country was followed by an "*Ec.*" But here the plaintiff has added, *Ec.*; consequently he meant something by it. Again, in the case of *Cowper v. Spencer*, 8 *Mod.* 376 * it does not appear whether any defence was made or not. But here there was a defence made. If the *Ec.* added in this case could be construed to supply the place of the *similiter*, it would only be issue misjoined and cured by the statutes of *jeofails*. But if it cannot be so construed, then it is not within the statutes of *jeofails*, and the only question is, whether it is amendable.

* This is
the same
case as in
Str. 641.

Mr. *Dunning*, and Mr. *Davenport*, in support of the rule, stated the proceeding to be thus: Two breaches were assigned under the *stat.* 8 and 9 *Wm.* 3. *c.* 11. To the first the *similiter* was added; to the latter only "*Ec.*" and in this form the paper-book was returned to the clerk of the papers. It was, in fact, therefore, his mistake. For upon the paper-book being returned the clerk is warranted to add the *similiter*, and award of *venire*, and every thing necessary for the trial. By returning the paper-book, therefore, the defendant is precluded from taking any objection; and cited *Gilbert's History*, *C. B.* 152, 153.

LORD MANSFIELD. One is ashamed and grieved that such objections remain. They have nothing to do with the justice of the case, but only serve to entangle, without being of the least aid in preventing irregularity.

Without considering whether it is within the statutes of *jeofails*, or not, it is best to amend to avoid a writ of error; and there are three grounds which satisfy me that the matter in this case is amendable. 1st, That it is an omission of the clerk. 2^{dly}, I will in this case adopt the reasoning of *Lord Coke*, and construe "*Ec.*" to mean every necessary matter that ought to be expressed †. 3^{dly}, By amending, the court only make *that* right, which the

† *Vide Co.*
Lit. 17. b.

the defendant himself understood to be so, by his going down to trial.

The three other judges concurred.

Per Cur.—Rule to amend absolute, and rule for arresting the judgment discharged.

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versus
POCOCK.

BRUCKSHAW *versus* HOPKINS.

Thursday,
Feb. 8th.

MR. Willes, on the part of the defendant had moved to discharge a rule obtained last term by Mr. Buller, on behalf of the plaintiff, for bringing back the *venue* to London, where it was originally laid, upon undertaking to give material evidence in London.—Mr. Willes's objection was, that the application for bringing back the *venue* was too late.

Plaintiff allowed to bring back the *venue* after plea pleaded.

The facts were, that, after the *venue* had been changed from London to *Lincolnshire* by the defendant, upon the common affidavit, the cause had gone down to trial at *Lincolnshire* assizes, when the plaintiff was nonsuited. This nonsuit had been afterwards set aside, and a new trial directed. Accordingly, the cause went down a second time to the assizes at *Lincoln*, to be tried before a special jury, but, for defect of jurors, was made a *remanet*. Mr. Willes insisted, that, after all these proceedings, the plaintiff could not bring the *venue* back to London; and cited *Dickenson v. Fisher*. 2 Str. 858.

LORD MANSFIELD —The Master says, he takes the practice to be according to the case in 2 *Strange*. 858. But it comes to the same thing: For the plaintiff may at any time move to amend his declaration by altering the *venue* *.

It was adjourned for the master to consider whether the plaintiff could bring back the *venue* after plea pleaded.

Lord Mansfield now delivered the opinion of the court.

We desired the Master to inquire into the practice, and consider, Whether the plaintiff could not bring back the *venue* after plea pleaded: The Master has accordingly inquired and considered about it; but he has not met with any thing material to the point in question, except the case cited from 2 Str. 858, and two cases upon amendment, 2 Str. 1,162. *Stroud v. Tilly*, and 2 Str. 1,202. *Rivet and others v. Cholmondeley*.

* N. B. That must be upon a rule to shew cause.

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We think it would be an idle circuitry to put the plaintiff to move to amend his declaration, in order to come at an alteration of the *venue*; and if we permit him *now* to bring it back, he does it at his peril; because, if he does not give material evidence in *London*, he must be nonsuited; and if it should appear to be a local action by statute, he will be nonsuited upon the opening.

The consequence is, that the former rule must stand, and Mr. *Willes* will take nothing by his motion.

Friday,
Feb. 9th.DENN *ex dim.* GEERING, *versus* SHENTON.

IN ejectment for the recovery of certain lands in the county of *Berks*, upon not guilty pleaded, the jury found a verdict for the plaintiff subject to the opinion of the court upon the following case.

William Geering, being seised in fee of the premises in question, by his will of the 28th of *November* 1738, devised the same as follows: "I give and bequeath to my grandson, *Samuel Shenton*, all that my meadow ground called *Picked mead*, lying and being in the parish of *Denchworth* in the county of *Berks*, to hold unto the said *Samuel Shenton*, and the heirs of his body lawfully to be begotten, and their heirs for ever, chargeable nevertheless, and charged with the payment of eight pounds a year unto my niece *Mary Stevenson* the elder, during her natural life, to be paid her by quarterly payments: But in case the said *Samuel Shenton* shall die without leaving issue of his body, then I give and devise the said meadow ground unto my nephew *William Geering* son of Mr. *William Geering*, of *Denchworth* aforesaid, to hold unto the said *William Geering* the son, and his heirs for ever, chargeable as aforesaid, and also chargeable with, and subject to, the payment of one hundred pounds, of lawful money of Great Britain, unto my niece *Ann Beale*, within one year next after the said *William*; or his heirs, shall be possessed of the said meadow ground."

"All the rest and residue of my goods, chattels, real and personal estates whatsoever, after the payment of debts, legacies, and funeral expences, I give, devise, and bequeath unto my grandson *Samuel Shenton*, his heirs, executors, administrators, and assigns."

The said *William Geering* the testator died in 1739.

The said *Samuel Shenton* the grandson entered and died seised, leaving issue *Samuel Shenton* the younger, his only child, who also entered and died seised.

Samuel

Samuel Shenton, the person last seised, attained 21, and died in 1768, having made his will, dated 23d April 1767, and thereby devised the premises to his mother, the defendant, *Mary Shenton*, and her heirs and assigns for ever, who entered, and is now in possession thereof under the said devise.

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DENN ex
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versus
SHENTON.

The lessor of the plaintiff is the nephew of the testator *William Geering*, and son of *William Geering* of *Denchworth* in *Berkshire*, mentioned in the will of the testator *William Geering*.

The question for the opinion of the court is, Whether the lessor of the plaintiff had a good title to recover the lands devised, in the ejectment mentioned?

Mr. *Baldwin* for the lessor of the plaintiff stated the question to be, whether *Samuel Shenton* took an estate tail, or an estate in fee; and insisted he took an estate tail. He cited 1 *Ventr.* 225. *King* versus *Melling.* 1 *P. Williams* 664. and 1 *Leon.* 285. there cited, which he said was exactly this case; also 2 *Bur.* 1,100. *Doe* on the demise of *Long* versus *Laming.*

Mr. *T. Cowper* contra contended, that the clear intention of the testator was to give the children of *Samuel Shenton* the elder a fee; and if so, the words "heirs of the body" might be construed to be words of purchase, or words of limitation according to such intent: That it had been expressly so held in the case cited from 2 *Bur.* 1,100. which he said was the only case he should take notice of, because it was exactly in point for the defendant. There the devise was to *M. R. and the heirs of his body* lawfully begotten, and to their heirs and assigns for ever: The court said "the intention of the testator was to give the children of *M. R.* a fee," and accordingly construed the words *heirs of the body*, to be words of purchase. Here the words "their heirs for ever," plainly shew the testator meant the issue of *Samuel* should take a fee. But another strong circumstance is, the legacy of 100 *l.* devised to his niece in case *Samuel* should die without leaving issue. Of necessity, therefore, the testator must mean a dying without issue at the time of his death; for if he intended she should wait till a total failure of issue, she might wait for an hundred years, or for ever.

Lord *Mansfield* asked Mr. *Cowper* if he knew of any case, where upon a limitation of lands, upon a dying without issue, those words had been confined to a dying without issue living at the time of the death. The distinction is, between a devise of lands and personal estate: in the latter case, the words are taken in their vulgar sense; that is, dying without leaving issue at the time of his death.

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death. In the former, they are taken in a legal sense; and that is, *whenever there is a failure of issue* *.

DENN
ex dim.
GERRING
versus
SBENTON.
* Vide Nichol-
son
versus
Hooper,
1 P. Wms.
199.—
Target ver-
sus Gaunt,
1 P. Wms.
432.—
Pinbury
versus
Elkin, 1 P.
Wms. 563.
—Forth
versus Chap-
man, 1 P.
Wms. 667.

Mr. Cowper named no such case, but dwelt on the absurdity of the devise to "*their heirs for ever*," if the intention was not to give a fee.

Lord Mansfield, after stating the case, said, the question is, whether the grandson took an estate tail, or an estate in fee? Now the devise is to *Samuel Sbenton*, and the *heirs of his body*, and *their heirs for ever*. But the words "*their heirs for ever*," are qualified by the subsequent words, "*in case he shall die without leaving issue*," which clearly shew it to be an estate tail; and then, the testator gives it over to the lessor of the plaintiff. It is too clear to admit of a doubt.

The three other judges concurred.

Per Cur. Postea delivered to the plaintiff.

Same day.

REX versus HART, Esq.

MR. Davenport moved for directions to the Master to strike out twenty-four of the special jury *ex parte*, in case the defendant and his agents should omit to attend the Master's next appointment. The motion was founded on an affidavit of three appointments having been made, and their declining to strike out till a day should be appointed for the trial.

The special jury had been nominated in last term: But the twenty-four had not been struck out by the parties. And the cause was not then tried; but was intended to be tried at the sittings after this term. The defendant's attorney attended the Master's third appointment to strike out, but declined doing it for the reason abovementioned.

Lord Mansfield was clear the Master might do it without any direction from the court; and declined giving him any in particular, but had no doubt he might do it now, just as if he had proceeded last term; and that it was right for him to act as usual, unless there should appear any particular reason to the contrary.

In the present case there had happened no change of sheriffs: which, as Lord Mansfield observed, had been given as a reason why the same jury should not serve for the trial of the cause, which had been already struck for a former intended trial. But he said, he did not see the reason why the change of the sheriffs in the mean time, should make any difference.

Mr.

Mr. *Wallace* said, the Court of *Common Pleas* had lately determined that it should be so, and that the change of the sheriffs makes no difference.

Lord *Mansfield* said, he was glad of it.

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versus
HART.

REX versus the Churchwardens of TAUNTON
St. JAMES.

Saturday,
Feb. 10th.

THIS was a return to a *mandamus*, directed to *John Ridge* and *Luther Trott*, churchwardens of *Taunton St. James* in *Somersetshire*, to restore *Lewis Cogan* into the place and office of sexton of the said parish.

Return to a
mandamus
that *L. C.*
was not
duly elected
sexton ac-
cording to
ancient cus-
tom; that
there is a
custom for
the inhabit-
ants, &c. to
remove at
pleasure, and
that *L. C.*
was removed
pursuant to
such custom,
is good.

They returned, that *Lewis Cogan* was not, according to the ancient custom of the said parish, *duly elected*, and sworn into the said place and office, as by the writ is supposed: and further they returned, a *custom immemorial* for the churchwardens and inhabitants paying scot, and bearing lot, or the major part of them to assemble and elect a sexton for the said parish; which person, so elected sexton, the churchwardens and inhabitants paying scot and bearing lot, or the major part of them, for that purpose assembled in vestry in the parish church, have for time beyond memory, been used and accustomed to remove; and still of right ought to remove from his said office, at their will and pleasure: and then they returned a discharge and removal of the said *Lewis Cogan* from the said office of sexton, pursuant to the custom; and, therefore, that they could not restore him.

Mr. *Alleyne* objected, that this return was bad as being inconsistent; for it shews that the sexton was not well elected, and yet that he was regularly turned out, which is repugnant; and if so though one part of the return be good, the court will award a peremptory *mandamus*: *Regina versus Mayor and Aldermen of Norwich*, 2 *Ld. Raym.* 1,244.

Mr. *Buller contra*: Both parts of the return are true; and they are not repugnant or inconsistent. The writ supposes he was elected according to the custom. To this it is returned, that he was not duly elected according to the custom. And they further shew a custom, to remove the sexton at pleasure, and that they have so removed him. This is no repugnancy: for he might be elected in fact, though not duly according to the ancient custom: and, therefore, they had a right to remove him. *Wright versus Fawcett*, *Easter 7 Geo. 3. B. R.* since reported in 4 *Bur.* 2,040.

Lord

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versus
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St. JAMES.

Lord MANSFIELD.—I see no inconsistency or repugnancy at all. They return that *Lewis Cogan was not duly elected*. But as it was clear he had been *in possession* of the office, whether duly elected or not, the return goes on and states, “*a custom in the parish to remove their sexton at pleasure; and that in pursuance of such custom, and agreeably thereto, they had actually removed him.*” Now where is the repugnancy of this return? If he was *not* duly elected, he certainly has no right to be restored. But whether duly elected or not, they shew a right by custom to remove him at pleasure, and that they have done so. There is no repugnancy in saying, that he was *not* duly elected, but that being *in fact* elected, they had according to an ancient custom removed him from the office. In either case they were equally entitled to exercise that right. Therefore, let the return be allowed.

The three other Judges concurred.

Monday,
Feb. 12th.

LINDON versus HOOPER.

An action for money had and received does not lie to recover back money paid for the release of cattle damaged by a defendant, though the distress were wrongful.

UPON a rule to shew cause why a new trial should not be granted in this case, Mr. Justice *Ashurst* read his report as follows: This was an action for money had and received brought by the plaintiff against the defendant *Hooper*, who had *distrained* the plaintiff's cattle. The plaintiff insisted he had a right of common, and demanded his cattle to be restored, which the defendant refused to do, unless the plaintiff would pay him 20*s.* for the damage done. Upon this, the plaintiff paid the money in dispute for the release of his cattle; and the action is brought for that money. At the trial the question was, whether the plaintiff was entitled to recover back the money so paid, by this species of action? My opinion was, that he could not; for it would be extremely inconvenient and hard if a defendant should, upon his parol be obliged to come and defend himself against any right that a plaintiff might set up, without giving him notice; and accordingly the plaintiff was nonsuited.

Mr. *Mansfield* shewed cause, and insisted that an action for money had and received, was not the proper method to try *this* right. 1st. Because upon the general issue, five or six different questions and matters of right might be involved, without any notice to the defendant, or intimation on the face of the record, how many and which of them were intended to be tried; or to which

which in particular it would be necessary for him to apply his defence. Consequently he might come totally unprepared; and if not, yet the law will not intend a party to be prepared, unless he is legally apprised by the record of what he is to defend. 2dly. The verdict itself will not decide the right; but only the immediate matter in dispute between the parties: And not even that, at any considerable distance of time. For as nothing appears on the record respecting the right, or even that the right itself came in question; it might happen upon a future dispute, even between the same parties, that the witnesses might be dead, and no trace might be to be found by which it could be ascertained how the right was determined. So that in such an action, the defendant would not only be put to the greatest difficulties in establishing his right; but after all, the remedy, if he should succeed, would prove inadequate. On the other hand, if *replevin* or *trespass* had been brought, either of which would have been the proper action to try this question; the defendant would have had full notice by the pleadings how to shape his defence, and the record after verdict and judgment would have been decisive of the right. But it will perhaps be insisted, that though *replevin* or *trespass* were open, yet the plaintiff had a right also to bring this action; and, therefore, was at liberty to make his election between them. But this is not like any of those cases, where a party having different remedies, may elect to sue either. In *Moses v. Macfarlan*. 2 Bur. 1,006. the defendant compelled the plaintiff to pay the money against his own express agreement not to do so. In *Feltham v. Terry**, it was the only action that could be brought. In *Astley v. Reynolds*, 2 Str. 915. the money was extorted from the defendant under duress of his goods: And no doubt, exaction or extortion of money is a good ground to support an action for money had and received. In *Sadler v. Evans*†, the only question was, whether this action lay against an agent for money received by him on account of his principal, and bears no similitude to the present case. In *Sir Richard Newdigate v. Davy*. 1 Lord Raym. 742. there could be no other action. But none of these authorities come near the present. The question here is a question of right; and either *replevin* or *trespass* would have been the proper remedy.

Mr. Morris and Mr. Buller, *contra*, insisted, that the payment in this case was a compulsory payment on the plaintiff for the release of his cattle, which had been wrongfully impounded; and, therefore,

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therefore, recoverable in this action. For wherever a party demands money *without right* and by compulsion, an action for money had and received will lie, notwithstanding there may be other actions open to the plaintiff.

But it is objected, that upon this form of action, the defendant could have no *notice*, what question was to be litigated. If he had not, it was his own fault: For on the demand of the cattle by the plaintiff, he told the defendant he had a right of common. The defendant denies he had such right, and insists upon a sum of money as a consideration for the cattle being released. It is, therefore, not true that the defendant had no notice; for he knew the grounds upon which he demanded the plaintiff's money; consequently he knew what he was to defend himself against.

Objection 2d. That replevin or trespass was the only proper action in this case.—Answer; the party may chuse his action for money had and received. In *Astley v. Reynolds*, 2 Str. 915. detinue or trover was open to the plaintiff; yet this action was held to lie.—In *Howard v. Wood*, Sir Thomas Jones 126-7. and *Arris v. Stukeley*, 2 Mod. 260. it was held, “that *indebitatus assumpsit* lies for the profits of an office:” In both those cases, every objection now made was insisted on and overruled by the court. The question to be tried was, Whether the grant of the office was good or bad; but that did not appear from the form of the declaration; nor was it possible for the defendant to be apprised what title the plaintiff intended to set up. Again it was not the only remedy; for an assize will lie for an office. Therefore, these authorities are expressly in point.

The question in the present case is, Who had a right to the money? If it was the plaintiff's right the action is well brought; for an action for money had and received will lie wherever it is due *ex equo et bono*. The very gist of the action is, that the defendant is obliged by the ties of natural justice to refund the money.

In *Feltham v. Terry*, the court held that trespass would have lain if the defendant had elected to pursue that species of remedy. The words of the court were these; “it is manifest that the taking was tortious, and that the plaintiff might have brought an action of trespass. But we all think he may waive the *tort*, and go for the money clearly due: And if he does, it is a benefit to the defendant: Because he can then recover no more than in equity he is bound to receive.”

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In all the cases cited, the objection as to want of notice was equally applicable; and so it must be in every action for money had and received. *Sir Richard Newdigate v. Davy*, 1 Lord Raym. 742. *Moses v. Macfarlan*. *Astley v. Reynolds*. *Sadler v. Evans*. But notwithstanding that, the fact is that this action is always most favourable to the defendant; for whatever defence he can shew to rebutt the plaintiff's title may be given in evidence on the general issue.

In another respect too this action in the present case is particularly favourable to the defendant; for he had a right to deduct any expence he might have been at on account of the cattle; which he could not have done if trespass had been brought. Therefore, upon the authorities, as well as upon the reason and justice of the case, the plaintiff is intitled to recover in this action.

Lord Mansfield now stated the case from the report of Mr. Justice Ashurst, from which I collected this additional circumstance not before mentioned; namely, that the defendant agreed to return the money if the plaintiff should make out his right; and then his Lordship proceeded to deliver the opinion of the court as follows:

The particular circumstances of a promise or agreement to return the money, if the plaintiff should make out his right, do not distinguish this case from the general question: They relate to an amicable settlement which never took place.

The question then is general; Whether the proprietor of cattle distrained, doing damage, who has paid money to have his cattle delivered to him, can bring an action for that money as had and received to his use?

Though, after the cause is brought before the jury, an objection to turn the plaintiff round, if the *merits* can be fully and fairly tried in the action brought, is unfavourable; yet, if founded in law, it must prevail. We were extremely loath to allow it without full consideration.

The present case is singular, and depends upon a peculiar system of strict positive law.

Distraining cattle, doing damage, is a *summary execution* in the first instance. The distrainer must take care to be *formally* right; he must seize them in the act; upon the spot: For if they escape, or are driven out of the land, though after view, he cannot distrain them. He must observe a number of rules in relation to the impounding and manner of treating the distress.

The law has provided two precise remedies for the proprietor of cattle which happen to be impounded.

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1st. He may replevy: And, if he does, upon the avowry, he must specially set out a right of common, or some other title, as a justification of the cattle being where they were taken. Or,

2dly, If he does not chuse to replevy, but is desirous to have his cattle immediately re-delivered, he may make amends, and then bring an action of trespass for taking his cattle; and particularly charge the money so paid by way of amends, as an aggravation of the damage occasioned by the trespass. If to such an action the distrainer pleads that he took them doing damage, the plaintiff must specially reply the right or title which he alleges the cattle had to be there.

If instead of an action of trespass, an action to recover back the money so paid by way of amends might be brought at the election of the plaintiff; the defendant would be laid under a great difficulty. He might be surpris'd at the trial: He could not be prepared to make his defence; he could not tell what sort of right of common or other justification the plaintiff might set up. The plaintiff might shift his prescription as often as he pleased; or he might rest upon objections to the regularity of the distress. The plaintiff can never be suffered to elect to throw such a difficulty upon his adverse party. Besides, as applied to the subject matter of this question, the action for money had and received could never answer the equitable end for which it was invented, and deserves to be encouraged. For the point to be tried and determined in this action is, Whether the plaintiff's cattle trespassed upon the defendant's land? That may depend upon the plaintiff's right or the defendant's right, or the fact of trespassing: Or it may depend upon mere *form*. If the distress was irregular, the amends must be recovered back again: So that, allowing the owner of the cattle to substitute this remedy in lieu of an action of trespass, would, as between the parties, be unequal and unjust; and upon principles of policy would produce inconvenience. It would break in upon that branch of the common and statute law which relates to distresses. It would create inconvenience, by leaving rights of common open to repeated litigation, and by depriving posterity of the benefit of precise judgments upon record.

As to prescriptive rights of common, the money paid by way of amends is a *special damage*; and is always so alleged in the declaration of trespass, which in every view is the action *peculiarly proper* for this kind of question.

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An action for money had and received is a *new experiment*. No precedent has been cited. This objection alone would not be conclusive; but upon principles of private justice and public convenience, we think the method of proceeding used and approved for ages, in the case of distresses, ought to be adhered to.

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There is a material distinction between this and the instances alluded to at the bar, where the plaintiff is allowed to *wave* the *trespass*, and bring the action for *money had and received*. In *those* instances, the relief is more favourable to the defendant. He is liable only to refund what he has actually received, contrary to conscience and equity. In *this*, informalities, in taking or treating the distress, would avoid the amends, though the defendant had a right to distrain. But, which is more material, in *those* instances, the plaintiff, by electing this mode of action, eases the defendant of *special pleading*, and takes the risk of being surprised upon himself. In *this*, he eases himself of the difficulty and precision of special pleading, and the burthen of proof consequent thereupon; and exposes the defendant to uncertainty and surprise.

The case of *Feltham versus Terry*, *Pasch.* 13 *Geo.* 3. *B. R.* relied on in the argument, was a case of goods taken in execution, and sold under a warrant of distress upon a conviction. The conviction was quashed, consequently there could be no justification. The plaintiff, by bringing his action for money had and received, could only recover the money for which the goods were sold. But, if trespass had been brought, the defendant must have pleaded specially, and the plaintiff might have recovered damages far beyond the money actually received from the sale of the goods. So, where goods are taken in execution, which are not the property of the persons against whom execution is taken out; the owner may wave the trespass, and bring his action for the amount of the money which the goods sold for.

We think this case not within the *reason* of any, in which, hitherto, the plaintiff has been allowed to wave the *trespass*, and bring this action.—We think, to allow it, would not tend to the furtherance of liberal justice, but would be a prejudice to the defendant, and in a public view, inconvenient. Therefore, we agree that the plaintiff was rightly nonsuited at the trial.

Per Cur.

Rule for a new trial discharged.

THE END OF HILARY TERM.

THE END OF THE FIRST VOLUME.



